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COURT OF APPEALS
DIVISION II
10 JAN 21 PM 2:17
STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS OF WASHINGTON

DIVISION II

NO: 39595-9-II

STATE OF WASHINGTON,

RESPONDENT,

V.

RAFAEL RIVERA,

APPELLANT.

APPEAL FROM THURSTON COUNTY SUPERIOR COURT

PRO SE SUPPLEMNATAL BRIEF OF APPELLANT

R.A.P. RULE 10.10.

A. IDENTITY OF PARTY

Comes now the Appellant by and through Counsel, Anne Crusser of Kalama, Washington, and through Pro Se status, who is an illegally incarcerated inmate at the Washington correction center, located at 2321 W. Dayton Airport road. P.O.BOX 900, Shelton, Washington, 98584. Cedar G-11 and seeks the relief confinement, as designated in Conclusion.

B. TABLE OF AUTHORITIES

Cases

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2. <u>State v. Delmarter</u> 94 Wn.2d. 634, 618 p. 2d 99 (1980)	14
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13. <u>California- green</u> 399 u. s. 149, 157 (1970).	14
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15. <u>Delaware v. Van Arsdall</u> , 475 U.S.. 637(1986)	12
16. <u>Dorsey v King Cy.</u> , 51 Wash. App. 664,674-675, 754 P. 2d.1255, Review denied, 111 Wash 2d. 1022 (1988)	36
17. <u>Douglas v State of Alabama</u> , 380 U.S. 415, 85, S.Ct. 1074, 13 L.Ed. 2d 934	31
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23. <u>People v. Johnson</u> 68 Cal. 2d 646,655,68, Cal.Rptr. 599, 606,441 P2d111, 118, (1968), cert. denied, 393 U.S.1051, 89 S.Ct. 679, 21 Led2d, 693 (1969)	30
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25. <u>Pointer v. Texas</u> , 380 U.S. 400, 406, 85 S.Ct. 1065, 1069, 13 L.Ed. 923	30
26. <u>Powell v. Alabama</u> 287 U.S. at 68-69, 53S.Ct. 63-64.	26
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36. <u>State v. Casbeer</u> 48, WnApp539, 542, 740 P.2d, 335 (1987)	15
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EVIDENCE RULES

401 / 801 / 802 / 607 / 608 / 609

WASHINGTON PRACTICE

VOLUME 16 CHAPTER 18-7

FRAUD- SILENCE

RCW'S

RCW 43.101.225 CRIMINAL JUSTICE TRAINING

RCW 26.44.030 ABUSE OF CHILDREN

WASHINGTON CONSTITUTION

ARTICLE 1 SECTION 22

UNITED STATES CONSTITUTION

SIXTH AND FOURTEENTH AMENDMENTS

C. ISSUES PRESENTED..

APPELLANT SEEKS REVIEW UNDER RAP 2.2 OF THE TRIAL COURTS DENIAL OF AND ABUSE OF CRR 7.8 (2)(3) AND (5) FOR REVIEW OF THE ISSUES OF DENIAL OF SIXTH AND FOURTEENTH AMENDMENT VIOLATIONS OF; AND REVERSAL OF THE THURSTON COUNTY DECISION.

FUTHER, APPELLANT ASKS THIS COURT TO VACTAE THE CONVICTION AND SENTENCE DUE TO THE ABUSES OF THE THURSTON COUNTY AUTHORITIES IN THIS CASE.

(1) DID THE TRIAL COURT ABUSE ITS AUTHORITY BY FAILING TO CONDUCT HEARING INTO IMPEACHMENT EVIDENCE AND NOT FINDING FRAUD BY THE PROSECUTOR AND HER STAFF IN THEIR CONCEALMENT OF MATERIAL EVIDENCE?

(2) DID THE TRIAL COURT FAIL TO FOLLOW THE LAW WHEN PRESENTED WITH NEWLY DISCOVERED EVIDENCE MATERIAL TO DEFENDANTS CASE, IN VIOLATION OF CONSTITUTIONAL RIGHTS AND CRR 7.8 (B)

(3) WAS DEFENDANT DENIED EFFECTIVE COUNSEL WHEN HE FAILED TO INVESTIGATE MATERIAL FACTS AND SUBPOENA WITNESSESS FOR DEFENDANT?

Appellant asks the Court for review based on RAP 2.2 THE TRIAL COURTS ABUSE OF DISCRETION. MANIFEST ERRORS AFFECTING A

CONSTITUTIONAL RIGHT, of the Sixth, Fourteenth amendments to the United
States constitution.

E BRIEF STATEMENT OF THE CASE

Lacey police detective Jeremy Knight under allegations of molestation arrested appellant on August 8 2005. During interrogation and before recording the appellant denied the allegations and informed the detective that the child and her mother had been accusing people of the similar crimes for the past two months. Appellant warned the detective that Mariah Maniger (the alleged victim) had accused a boy in school and that recently she even accused the neighbor. Appellant also asked that he check the Lacey police files for a recent police report made by the child's mother (Melissa Marney) in which she boldly accused her estranged husband and his friend of molesting children, rapes, having child porn, and association with a child porn ring. The detective refused to verify appellants' statements and omitted the information from the probable cause declaration to the deputy prosecutor. Rivera was arrested, probable cause for the charges was found based on the declaration of prosecutor supporting probable cause filed August 9, 2005. This probable cause "signed under penalty of perjury by deputy prosecutor Phillip Harju. Charges were later amended to include two other alleged victims.

Appellant continued to maintain his innocence during incarceration. Appellant requested defense counsel to find the evidence and requested that Melissa Marney be

brought to testify and that her influence be exposed, along with the people involved in the prior accusations. Requests for information yielded nothing, defendant went on to trial.

It was at trial and outside the presence of the jury that the prosecutor, during motion in limine presented the court and defense counsel the specific evidence and the information requested by Rivera for nine months.

The evidence consisted of, two prior similar accusation made by the child in June and July of 2005, against a school mate and a neighbor, known to be false to Jack Marney (step father of the child, Marney who confronted the neighbor), Michael Maninger (father of Mariah Maninger), and school staff. The state also excluded the arrest of the mother by the Lacey police department for false reporting against Rivera, dated august 5 2005, the night of the accusation.

This motion to exclude this specific evidence confirms that the state had full knowledge of Rivera's request for information and found the information but failed to disclose it.

The State concealed one police report of Melissa Marney accusing her husband and his friends of Rape, molestation, child porn, and child porn ring this report was dated 15 July 2005 twenty days before appellant was accused.

The State moved to exclude the evidence as not relevant to the case. A known false and misleading statement unsupported by the record, that lead the court to dismiss three of four pieces of the most obvious material, impeachment evidence a decision based on unreasonable and untenable grounds. This failure by the state to disclose the information cost the appellant a vital amount of direct evidence. Without any evidence or witnesses, effective cross-examination and impeachment of the states witnesses, or

opportunity to present a proper defense was denied. Defense counsel did not object to the exclusion but Rivera did object to the exclusion of evidence.

The court allowed the suppression of the evidence without any weighing of the evidence, finding of fact, or conclusion of law abusing its discretion.

This evidence vital to the defense would have been admissible to question the truthfulness, bias, credibility, motive, improper influence, recent fabrication, and explain the precocious sexual knowledge of the alleged victim Mariah Maninger.

This evidence would have also been admissible for cross-examination of the father Michael Maninger and to his knowledge of his daughter's prior false accusations.

The lead investigator detective Jeremy knights knowledge of the mother and daughter making these malicious accusations, which he omitted from his probable cause statement. Appellant lost his freedom when found guilty of crimes that where never committed. But allowed to be charged.

During direct appeal the appellant submitted the additional grounds but was unable to show any evidence of prejudice to the grounds presented herein, the Court stated in the Decision "Rivera presents no evidence or citation to the record to support his claim, @ 38 See Attachment #3

"Again Rivera presents no evidence or citation to the record to support this claim and as such we cannot address it". @ 48. See Attachment 3 Decision #34827-6-II.

The direct appeal is still being affected by the states failure to disclose and suppression of Rivera's evidence. This Appellant after losing his trial and through due diligence and public disclosure brought to and presented to the Trial Court with the

evidence that proves his initial grounds which consists of violations of his constitutional rights under the Sixth Amendment to confrontation, compulsory process and impeachment of state witnesses, right to discovery and effective counsel.

This Appellant is again before the Appellate Court after a denial of his 7.8 Motions submitted in June 2008 after several months the Trial Court transferred the Motion to the court of Appeals, but was rejected under State v. Smith, it took Appellant another year of arguing back and forth between the Trial Court and the Court of Appeals. Before the Trial Court held a Hearing. See Attached decision. "Order Denying.". Pages 2 through 6. The Trial Court Denied the Motion after a telephonic hearing in which the Prosecution appeared in person and presented no argument on June 10, 2009.

On June 15th, 2009 The Thurston county Judge issued his decision held that the issues presented had been addressed by the Court of Appeals. Which was Error. Further the trial court found that Appellant was not entitled to relief under CrR 7.8(5). See Trial courts order Denying at 19-21 Attachment #4

At page 16, of the decision to deny the Judge Admits that the documents were kept from Appellant, but since counsel did not call the "witness", therefore, no error occurred. Further, The judge states "It is uncertain to what extent she might have been allowed to testify".

The Judge in this case Abused his discretion when he ruled that the court of appeals had already addressed these problems, when he was aware that Appellant had not been given Discovery. And it was an Abuse of the Court to deny the motion. And now the issues are before this Court to decide "Did the Trial court Abuse its Authority when it Denied Appellant's Motion.

D. ARGUMENT PRESENTED.

STANDARD OF REVIEW.

ABUSE OF THE COURT.

Under the Laws of the State of Washington, Appellant brings this Appeal based upon the Abuse of the trial court in its decision of June 15, 2009. And it's Denial of Appellant's Motion pursuant to CrR 7.8. The Abuse standards are set forth in State v. Zaval-Reynoso, 127 Wn.App.119, 110 P.3d 827 (2005), and State v. Hardesty 129 Wn.2d 303, 915 P.2d 1080 (1996)

DID THE TIRAL COURT ABUSE
ITS DESCRETION WHEN ITS DECISION
DENIED APPELLANT HIS
CONSTITUTIONAL RIGHTS? AND
VIOLATED KNOWN LAWS WHEN IT
DENIED THE MOTON.?

The Sixth Amendment to the United States Constitution and article I section 22, of the Washington State Constitution guarantees criminal defendants the rights to confront and cross-examine adverse witnesses against them. Here that trial Court abused its discretion, and abused its authority when it found Plausible, and Probable Error. And did not order Evidentiary Hearings onto the matter of the Withholding of evidence.

This appellants case involves a straightforward violation of his constitutional rights under the Sixth Amendment right to confrontation and compulsory process, discovery violations, and ineffective counsel.

During incarceration in Thurston county jail, Appellant requested specific information concerning Prior Police Reports and Incidents, from the then defense counsel attorney Samuel Meyer, and defense investigator Paula Howell which were part of the Discovery. The state was informed of Appellants requests but did not present the following information until trial In a Motion in Limine, without disclosing the true nature of the reports. Exhibit 2. Page 2.

This information was not provided for defendants appeal, causing prejudice by denying a fair appeal, and was obtained by due diligence through public disclosure. The Court of Appeals recognized the fact that Appellant was not provided these Documents when he presented his original Appeal, and held that he did not prove his case, because he could not produce the Documents in question. See Decision of the Court. attachment 3

Exhibit #1

Notes of Paula Howell defense investigator dated January 2006

Howell was sent to Rivera when Rivera refused to sign a fourth continuance. In these notes Rivera informs investigator Howell of the names and accusations made by the mother Melissa Marney and her daughter Mariah and about the police reports made to the Lacey police in July 15, 2005 and August 5, 2005 by Melissa (the August report revealing her arrest for false reporting), the July report shows Melissa accusing her husband and his friends (yielded no arrest.).

See page # paragraph #

Exhibit #2

Statement by defense attorney Samuel Meyer in 2008.

Meyer admits to the bar association, that Rivera, during his incarceration insisted that the alleged victim had been accusing other people of similar acts

And also states that he did not receive information pertaining to the accusations.

See page # paragraph

Exhibit # 3

Motion in limine to exclude evidence in defendants' trial

The state prosecutor Christen Peters moves the court to exclude evidence of the alleged victim Mariah Maninger accusing a school mate and a later a neighbor of similar acts, and asking that the police report and the arrest of Melissa Marney, mother of the alleged victim, be excluded and that Melissa would not be testifying. The state refers to the evidence as not relevant to the case despite the open accusations against Rivera of rape and molestation in the arrest report of Melissa. (See exhibit #4 page1-para. 7.) (Peters makes no reference of the July report)

See rp #53 at 16 through rp #55 at 17

Exhibit #4

Lacey police department report # 05-4458

On August 5, 2005 Lacey police receive a report of assault, home robbery and car theft from Melissa Marney. (The same night of alleged molestation of her daughter) after Lacey police investigate the matter, Melissa Marney is arrested by the police for filing a false report, possession of meth, and attempted assault against Rivera.

Once the police uncovered Melissa false allegations she changed her story, to one of her own rape and the molestation of her children by Rivera, she was arrested and booked in to county jail. (See page#1-para 7) (Rivera was living at Jack Marneys apartment.).

Exhibit #5

Lacey police department report # 05-4033

On July 15, 2005 Lacey police receive a report from Melissa Marney of a possible assault by a friend or hers (John) who is allegedly going to shoot Melissa estrange husband Jack Marney and his friends for allegedly molesting his little boy. The report develops into a bizarre presentation by Melissa Marney of accusations against Jack Marney and his friends involving child molestation, child rapes, child pornography, and involvement of the group in a child porn ring. Allegations are denied and there is no arrest (Rivera witnessed Melissa make the report to officer Jim Esslinger (aka kemo) Rivera gave this nickname to investigator Howell and in late 2007 Rivera used this same nickname to find the July report through public disclosure.

DENIAL OF IMPEACHMENT EVIDENCE
DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED
APPELLANTS CRR 7.8 MOTION WHEN PRESENTED WITH NEW EVIDENCE
AND IMPEACHMENT EVIDENCE.?

The Sixth Amendment to the United States Constitution and article I section 22, of the Washington State Constitution guarantee criminal defendants the rights to confront and cross-examine adverse witnesses against them this right secured for the defendant in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400(1965) includes the right to conduct reasonable and effective cross- examination. Davis v. Alaska.415 U.S. 308, 315,316 (1974)

In Davis v. Alaska the court observed that, subject to “the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation...the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witnesses.”Id, at 316. Emphasizing that the exposure of a witness motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Id, at 316-317, citing Green v. McElroy, 360 u.s.474, 496(1959), Delaware v. Van Arsdall, 475 u.s.

637(1986) reaffirming Davis, and held that “a criminal defendant states a constitutional violation of the confrontation clause by showing that he was prohibited from engaging in other wise appropriate cross-examination designed to show a form of bias on the part of a witness, and thereby to expose to the jury the facts from which the jurors could appropriately draw inferences relating to the credibility of the witness”475 U.S.,at 680, quoting Davis, supra, at 318. But no obligation is imposed on the court to protect a witness from being discredited on cross-examination, the court has a duty to protect the witness from questions that go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him. Alford v. united states, 282, U.S. 687,51 s. ct. 218,75 L.E.d. 624.

Under the due process clause or the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. A standard of fairness that requires the criminal defendant be afforded a meaningful opportunity to present a complete defense. A defendant has a constitutional and protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Brady v. Maryland, 373 U.S., at 87,83 S.Ct. at 1196. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant’s guilt. United States v. Agurs, 427 U.S. at 112,96 s. ct. at 2401

In the case of this appellant the information was requested from the time of his arrest on August 8, 2005 until the day of his trial in April 3, 2006 with out any results. The knowledge by the state of the request made by the defendant is shown in the states own actions at trial, in which the states motion in limine to exclude the three pieces of evidence is recorded on the court record. The statement by the prosecutor labeling the evidence, as “not relevant to the case” was a boldly false, and misleading statement, see exhibit #3 rp #53 at 21

If this Court will look to Appellant’s CP. Lacey PR Exhibit 4 page 2 at para-7, which is an open ended Complaint/Accusation by the alleged victims, mother. At page 2, line 1, which clearly states, “Melissa said she became very upset and mad at Rafael had sexually abused her daughter.”

The Trial court ignored all reference to the Newly Discovered item by Appellant at the hearing of June 15, 2009, based upon an interview with the police. And Appellant. Which was not the question before the court. 06-15-09. RP.15-16. The New Evidence found and presented, is Lacey Police report # 05-4033 WHICH was never presented or discussed at trial and the court is in error. Police report # 05-4033 that shows that Melissa had carried out a similar false malicious attack on her husband and friends just twenty days before, making Rivera the seventh person accused in eight weeks by the child and mother. This along with her accusations against Rivera on the night of her arrest would show a pattern. The courts failure to evaluate the suppressed evidence and the new evidence would have uncovered the connection.

Brady's disclosure requirements extends to materials that, what ever their other characteristics, may be used to impeach a witness, United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 LEd. 2d 481 (1985). Here prior accusations of similar acts carried out by the alleged victim on three occasions in eight weeks, and her mothers actions on the two Lacey PD reports around the same time, were of significant relevance to Rivera. Who insistence that the accusations against him were fabricated and that the mother, Melissa Marney, had influenced and was involved with the actions against Rivera, for she had done the same against her husband and his friends twenty days before SEE EXHIBIT #4 and # 5.

Evidence rule 401

Relevant evidence; means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evidence rule 401.5

Relevant evidence materiality; with reference to materiality, rule 401 defines relevant evidence as evidence that tends to prove or disprove "any fact that is of consequence to the determination of the action...."facts that are "of consequence " include facts that offer direct evidence of an element of a; also included are facts that imply an element of a (circumstantial evidence), as well as facts bearing on the credibility or the probative value of other evidence (background information and evidence offered to impeach or rehabilitate a witness)

The prior similar allegations of the child and mother were relevant to the charges against Rivera and material to the credibility of more than one witness at trial.

In Appellants case the child's prior accusations were in every way relevant to the matters of the credibility and untruthfulness of the state witnesses to include; the alleged first victim Mariah Maninger, Michael Maninger (father), and lead investigator Jeremy knight. The early concealment by Detective Knight, late disclosure and suppression at trial by the state deprived Rivera of a proper defense, to include the direct evidence of the Mountain View elementary school staff, which suspended Mariah for lying in June '05 after allegations of having her breast touched by a classmate, and Jack Marney (step father) who personally confronted the mentally disabled neighbor and his parents in July '05, and also found the child to be lying. The circumstantial and direct evidence, which shows the mother and daughter making similar malicious accusation at almost the same times, was vital and relevant to the defense even when the defense was one of denial. Circumstantial and direct evidence are equally reliable, State v. Delmarter 94 Wn..2d. 634, 618 P. 2d 99 (1980)

It is this action that deprived this appellant of his right to confrontation when the state motion for excluding the evidence at trial goes unchallenged (unquestioned) by the court or defense counsel. The right to confrontation is a trial right designed to prevent improper restrictions on the types of questions defense counsel may ask during cross examination. California- Green 399 U.S. 149, 157 (1970). In Morgan, 54 p.3d. at 336, the supreme court concluded that excluding extrinsic evidence of a witness's prior false allegations deprives the fact finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of a witness.) Similar reasoning led the Ninth Circuit to conclude that exclusion of proof of possibly false prior accusations denied the accused his right to confrontation. Fowler v. Sacramento county sheriff's dept. 421 F. 3d 1027, 1040(9th cir. 2005)(; where as here, the proffered cross-examination might reasonably have influence the jury's assessment of Lara's reliability or credibility, absent sufficient countervailing interests, the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [Lara's] testimony which provided a crucial link in the proof.

In the appellants' case the trial right to confrontation is eviscerated by the state's awesome power, when in a matter of seconds it excluded Rivera's only and most obvious, material, impeachment evidence as "not relevant to the case", a false representation of the content of the evidence suppressed, and with it the proof that would have shown that the prior accusations were false. Denying Rivera his Constitutional right to confrontation including the confrontation of the accuser Melissa who openly accused Rivera in the arrest report suppressed by the state. On the word of the state the evidence is removed without any weighing of facts or conclusion of law denying Rivera material evidence and his right to confront an accuser (the finder of fact determines credibility State v. Casbeer 48, WnApp539, 542, 740 P.2d, 335 (1987), restricting an effective cross-examination of state witnesses. See exhibit #3 rp 53 -55. This shows the blind faith of the court, in state prosecutors to comply with the constitutional privileges to deliver material evidence into the hands of the accused protecting from erroneous convictions and ensuring the integrity of the criminal justice system, although due process requires that the trial judge and jury evaluate such evidence, here the court abuses its discretion in its decision based on unreasonable and untenable grounds.

The Court of Appeals has treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendants right to confront adverse witnesses." 719 F 2d, at 1464. Relying on Davis v. Alaska 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). Denial of impeachment evidence to effectively cross-examine prosecution witnesses constitutes "constitutional error of the first magnitude" requiring automatic reversal. 719 F 2d at 1464. Davis v. Alaska 415 U.S., at 318, 94 S.Ct. at 1111.

The most rudimentary of the access to evidence cases impose upon the prosecution to report to the defendant and to the trial court whenever government witnesses lie under oath. Napue v. Illinois, 360 U.S.264, 269-272, 79 S.Ct. 1173, 1177-1179, 3L.Ed.2d 1217 (1959) conviction must be set aside if there is reasonable likelihood false testimony affected the jury's verdict); see also Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed791 (1935) deliberate suppression of impeachment evidence to obtain a conviction constitutes denial of due process). The Court reaffirmed this principle

in broader terms in Pyle v. Kansas, 317U.S. 213, 63 S.Ct. 177, 87 Led.214 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation

In Rivera's trial, the state presents three witnesses that could have been impeached by the suppressed evidence on their credibility and to the falsity of their statements under oath.

Lead investigator Jeremy Knight who despite having knowledge and possession of material facts of the malicious acts of the mother and daughter, omitted the information from his probable cause declaration, failing to make a full and fair disclosure, in good faith, of all the material facts known to him Bender v. Seattle, 99 Wn.2d. 582,593-94, 664 P.2d 492 (1983) in violation of RCW 26.44.030 (14), 26.44.060 (4) finding of malice and withholding evidence required by statute to be disclosed. SEE ATTACHMENT 1 (probable cause declaration)

Here Knight committed Fraud; in proving claims of fraudulent concealment or misrepresentation, a plaintiff may simply show that the defendant breached an affirmative duty to disclose a material fact. To satisfy a claim of fraud, a plaintiff must prove that the defendant made a misrepresentation, or nondisclosure, of an existing material fact.

Washington law follows the Restatement rule that imposes liability when one fails to reveal material facts within one's knowledge when there is a duty to speak., and stated another way, when a duty to disclose exists, the suppression of a material fact is tantamount to an affirmative misrepresentation. Knight ignores this duty to inform the prosecutor of the evidence presented here, information he possessed and had been made aware of in his interrogation of Rivera.

An action that implicated the Deputy Prosecutor Philip Harju, to sign the Certificate of declaration of probable cause Under Penalty of Perjury causing the prosecutor to file criminal charges and arrest Rivera in violation of RPC 3.7, Kalina v. Fletcher 522 U.S 118, 130-131, 118 S.Ct., 502, 139, Led.2d 471 (1997) this being the first act of Fraud against the court SEE ATTACHMENT 1 (certificate of probable cause)

Detective Knight presented child and mother as the witnesses in his report, and could have been cross-examined on the veracity of the information he received from

them, to what he knew about them in the information he omitted. His investigation being triggered by police report 05-4458 (exhibit# 4), which involved Melissa Marneys arrest for false reporting to his fellow officers in the Lacey police dept. three days prior, making Melissa an accuser, which was later suppressed at trial as not relevant to the case. SEE ATTACHMENT 1 (certificate of probable cause)

It is the knowledge of these prior malicious acts that show the perjury committed by detective Knight at trial. SEE ATTACHMENT 2 (direct of Jeremy Knight)

RP 132 at 11-25

Q .Did you ask the defendant if he had to do it over again what would happen?

A. The question I asked him was along the lines of if you had to this over again, would you have had the same physical contact with her.

RP.133 at 3-14

Q. Could you please indicate to the jury what the defendant said.

A. Upon my asking him that, he said, “like I stated for years, after, you know, I tried to avoid any physical contact with Melissa’s kids because I know they’re—you know, how things have been in the past and I really showed them no affection whatsoever. You know, I love them as in for what they are, they’re my nieces and nephews, but that’s to say –is just to be family love.

Q. So he’s asked –answering your question like he’s tried to avoid contact. Is that what he said to you?

A. That’s how I took it, yes.

In this statement the appellant is again referring to his careful interaction with Melissa Marney’s children, because of the children’s history for false accusations, accusations that Rivera had brought to the attention of detective Knight prior to recording his statement. Knight presented the statement to mean that Rivera had a problem to which he was trying avoid contact with children.

In attachment #2 (cross-examination of Knight) RP.146 at 3-10

Q. You’ve tried to pin him down about whether or not he actually did this; is that correct.

A. Correct.

Q. And each time you've gotten specific about certain areas, he has said, no, that's not what happened; is that correct?

A. That's a gross summary, but yes.

. The states presentation of Mariah Maninger as an innocent child to the jury while suppressing her prior similar accusations of others mislead the jury and deprived Rivera of his impeachment evidence that could have created a reasonable doubt on her credibility and untruthfulness. SEE ATTACHMENT 2 (direct of Mariah)

RP. 75 at 7-11

Q. And do you know the name of the chair that you're sitting in right now?

A. Truth chair.

Q. Why is it called that?

A. Because you have to tell the truth in the chair

This statement to establish and support her credibility was a bold act of perjury; the same neighbor with the pool mentioned in the probable cause was where Mariah and her brother Victor spent the entire day and came home just twenty minutes before her father picked them up. Either party never presented the testimony of this neighbor. Her presentation of the alleged crime was a lie neither her nor this appellant were at the house.

The fathers' false concern knowing that his daughter had already accused two people before Rivera, accusations he did nothing about until Rivera was accused. Although Maninger shows his dislike for Rivera, Rivera is restricted from attacking his bias and motive when he did not believe the prior accusations, but jumped at the accusations against Rivera and supported his daughter as being truthful. SEE ATTCHMENT 2 (direct of Michael Maninger)

RP. 63 at 8-25

Q. Sell her dirt bike?

A. Yeah. She won't even let her brother sit on the dirt bike so I was like, woe, what's the matter? And I kind of took her inside and she told me she didn't want to go to her mom's. And then she said that some one had touched her inappropriately.

Q. So she told you something concerning?

A. Yes.

Q. And based upon what she told you that was concerning, what did you do next?

A. I told her that I wanted to call the police, and she didn't want me to. And we talked for a little while and she kind of – you know, keep trust with your kid, you know, so we talked about it and ended up calling the police department.

Michael Maninger made this statement with full knowledge that his daughter had used the same accusation statement twice in prior weeks. Accusations he did nothing about until she accused Rivera.

In a quote used in Davis from Green v. McElroy gives further support to the right to establish that the accusing witness is a “perjurer”; Davis, 415 U.S. at 316-27 the court held;

Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consist of the testimony of individuals whose memory might be faulty or who in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

The right to rebut denied to the defendant by the suppression and nondisclosure of the evidence showing prior fabrication (three similar accusations by the child in eight weeks and two police reports of similar accusations by the mother at approximately the same time, reports showing motive and influence. Evidence showing Rivera was the seventh person accused in eight weeks. This information known to the father of the child and to the lead investigator, both who testified at trial.

These state witnesses presented out of court statements in violation of ER. 801(c); which states that a prior out of court statement is hearsay if offered to prove the truth of the matter asserted. The general rule is that hearsay is not admissible Er 802. A witness prior consistent statement may be admissible as non-hearsay if offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive Er 801(d)(1)(ii). The material evidence would have challenged the credibility of the statements to the true knowledge of the declarant's.

E.R. 608 (a)(b) would have allowed the evidence to be used to attack the witnesses on credibility, reputation of character and specific instances of conduct.

Er 608(b) failure to allow cross-examination of states witnesses under Er 608(b) is an abuse of discretion if the witnesses are crucial and the alleged misconduct

constitutes the only available impeachment evidence. State v. Clark 143 Wn. 2d 731,766, 24p. 3d 1006 (2001).

Rivera states that his constitutional rights under the Sixth Amendment to confrontation, to impeach the witnesses against him, his compulsory process to obtain the testimony of those involved, and his fourteenth amendment right to due process and rights to a fair trial were substantially prejudiced by the suppression of the evidence presented here.

DISCOVERY VIOLATION

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION WITHOUT FINDING THAT THE PROSECUTION DELIBERATLY WITHHELD INFORMATION FROM DEFENSE? (FRAUD)

Appellant had a constitutional right to discovery, the court rules dictate under CrR 4.7 the balance between the prosecutors' obligation and defendants' obligation. Prosecutors obligation under 4.7(a)(3)(4); state that the prosecutor shall (shall being mandatory) disclose to the defendants counsel any material or information within the prosecuting attorney knowledge which tends to negate the defendants guilt as to the offense charge. His obligation is limited to material and information within the knowledge, possession or control of members of the prosecuting attorneys staff including the police. Including the additional disclosure upon request and specification 4.7 (c) and materials held by others 4.7(d)

Rivera's specific request went unanswered from his interrogation and through his entire incarceration only to be presented and suppressed at trial and even the police report that triggered the investigation and his arrest was labeled not relevant. See exhibit #3-4

The Trial courts Ruling addressed only that Counsel and Prosecution knew what the Discovery Contained. But that it was not brought forth in the Court. This was abuse due to the simple fact that these Documents were not brought forth, and Defendant allowed to argue the Document. Nor was the Document identified for its true content that show that Melissa Marney was an accuser, another act of Fraud in the Court, through misrepresentation. (06-15-09 page 16. Also see Letter of Counsel. Exhibit 2- Police Report 05-4458. Page 1 para-7).

The importance of the 4.7 rules to the trial process based upon the information that is expected to be provided by the state, defense counsel prepares trial strategy including developing statements to the jury for a defense theory. These rules in their need for preparation of the defense were not followed and were violated by the state in its intentional nondisclosure until trial, and an error of nondisclosure infringes on the petitioners constitutional rights and the error is considered prejudicial State v. Caldwell 94 Wn. 2d 614.

The State discovery violation rendered counsel functionally ineffective, defrauding the court and defendant, and prevented counsel from adequately representing Rivera. The failure to disclose material evidence until the middle of a jury trial despite the fact the relevance and materiality and impeachment nature of such obvious evidence in the prior accusation by the child and mother constitutes truly egregious misconduct by the prosecutor in Rivera's case, an action done with ill intent, that even if counsel would have objected it would have had no effect. (We were already in trial.) The issue of prosecutorial misconduct at trial is waived unless the misconduct was so ill intentioned that it evinces and enduring and resulting prejudice that could not be neutralized by an admonition to the jury "State v Stenson, 132, Wn 2d 668, 719, 940 P. 2d 1239 (1997)

The document was not made available to counsel, it was not made part of the original discovery. And it was denied to Appellant until he located it on his own in Freedom of Information. Which clearly made Counsel Ineffective.

The Court abused its discretion in not finding that the state and the investigator committed Fraud

The fraud presented by Rivera consists of the four pieces of evidence of malicious false accusations made by the alleged victim and her mother, which existed throughout the entire proceeding and concealed by the state. The fraud is established from these four pieces of material evidence and facts showing a pattern of accusations being omitted by Det. Knight in his declaration to probable cause. In which he includes the child and mother as his primary accusers and witnesses, in addition to the continued concealment by the state until Motions in Limine, at this point the evidence is acknowledged and suppressed through a false representation of its true content, showing the breach of their

legal and fiduciary duty to speak and to disclose the material facts within their knowledge and possession.

The Washington Practice Vol. 16 Chapter 18 Misrepresentation and Fraud.

Sub. Section 18.7 Fraud-Silence

Washington Law follows the Restatement rule that imposes liability when one fails to reveal material facts within one's knowledge when there is a duty to speak. A failure to speak in the face of such duty is in effect, a representation of the nonexistence of a fact that is not disclosed. Stated another way, when a duty to disclose exists, the suppression of a material fact is tantamount to an affirmative misrepresentation. The existence of a duty to speak is a question of law. Once the determination is made that a legal duty exists, the jury's function is to decide whether the facts come within the scope of such duty.

A duty to disclose may arise, however, when the parties enjoy a fiduciary relationship, or when the party knows that the other party is acting under a mistake as to undisclosed material facts, and that mistake (if mutual) would render void able a transaction caused by relying thereon.

Washington Law clearly establishes the duty to speak and presents the fiduciary relationship as a matter of law, in the investigation of the types of crimes as the one alleged herein. These laws have the legislative intent that Prosecutors, investigators, and defense attorneys are properly trained for the proper prosecution of alleged sexual crimes.

RCW 43.101.225 Criminal Justice Training Commission

Training for persons investigating child sexual abuse, establishes a legal duty along with a fiduciary duty intended by the legislature to assure, to the extent possible, that investigative interviews are thorough, objective, and complete.

RCW 43.101.225 (3) (d)

RCW 43.101.225 (2) is specific on what departments are to benefit from this training. It clearly includes law enforcement, and prosecuting attorneys. And the training is focused on the investigative duties of law enforcement and prosecutors established under RCW 26.44

RCW26.44.030 Abuse of Children

RCW 26.44.030. (5) States that; Any law enforcement agency receiving a report of an incident of alleged abuse or neglect, orwho has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor or city attorney for appropriate action whenever the law enforcement agency reveal that a crime may have been committed.

RCW 26.44.030 (14) presents a fact that is acknowledged by the legislature. This fact is the possibility of false and malicious reports stating; upon receipt of a report of alleged abuse or neglect the law enforcement agency may arrange to interview the person making the report and any collateral sources to determine if any malice is involved in the reporting.

The malice and falsity in the evidence in the possession and knowledge of the investigator and the prosecutor, was obvious. In which the child and mother accused seven people in eight weeks of similar acts.

These RCW's combined with CrR 4.7; create a binding and continuing duty to speak as a matter of law in the intended fiduciary relationship of investigator and prosecutor. Obligations under this section are limited to material and information within the knowledge, possession, or control of members of the prosecuting attorneys staff. CrR. 4.7 (a)(4)

It is the omittance of these material facts and evidence already in the possession and knowledge of the investigator, and his concealment of the evidence from his declaration of probable cause. Along with the prosecutor's knowledge and concealment for eight months, of the same material facts and evidence, that establishes a breach of the duties required by law of the prosecutor and staff.

Fraud as described by the Washington Practice Vol. 16 chapt. 18-7 Fraud- Silence

Under the Due Process clause of the Fourteenth Amendment it must be demonstrated that the state prosecution ... comported with prevailing notions of fundamental fairness such that (the defendant) was afforded a meaningful opportunity to present a complete defense. State v. Lord 117, Wn. 2d, 829, 867, 822 P. 2d177 (1991). The state disobedience to a discovery rule can constitute a violation of defendants right to due process. SEE State v. Bartholomew, 98, WN.2d 173, 205, 654 P.2d 1170 (1982).

Simply because particular evidence presented here was not useful to the prosecutor does not mean that Rivera's defense could also consider it irrelevant.

INEFFECTIVE COUNSEL

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT FOUND THAT COUNSEL WAS NOT INEFFECTIVE WHEN THERE WAS A POSSIBLE, PROBABLE DIFFERENT OUTCOME TO THE TRIAL. AS STATED IN STRICKLAND V. WASHINGTON.?

The trial court when it held the CrR 7.8 hearing on June 12, 2009, made the ruling that there could have been a Different Outcome to the trial, that it was Plausible, probable 06-15-09. RP.17-19_ (SEE ATTACHMENT #4)

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel, is fundamental and helps assure the fairness of our adversary process. This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that which fell below an objective standard of reasonableness "State v. Grieff, 141 Wn. 2d, 910, 924, 10 P. 3d 390(2000) Roe v. Flores Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1034, 145 L Ed. 2d 985(2000) A criminal defendant has a constitutional right to effective counsel State v. Horton 136 Wn App. 29,36, 146, P3d 1227(2006)

This appellant presents the court with the evidence that was not disclosed to the defense counsel and which defense counsel failed to investigate, the evidence was later suppressed at trial. It was this action by the state that rendered counsel functionally ineffective. Although the defendant informed counsel of the existence of the evidence, it is clearly on the record that the specific evidence requests were found by the prosecutor, withheld from defense counsel and suppressed.

For an appellant to prevail on a claim of ineffective counsel, he must show;

- (1) That counsel's representation was deficient.
- (2) That the deficient representation prejudiced him

State v. Aho, 137, Wn 2d, 736, 745, 975, P 2d 512 (1999)

Appellant has already meet the standards set for ineffective assistance of counsel, when the trial court judge found that there was Plausible, and probable

To meet the first part of the test, the representation must have fallen “below an objective standard of reasonableness”. This part is highly deferential and courts will indulge in a strong presumption of reasonableness State v. Thomas, 109 Wn 2d, 222, 226, 743 P 2d 816 (1987).

In 2008 defense attorney Samuel Meyer responded to a complaint submitted by Rivera to the Washington Bar Association to which Rivera accused Meyer of collaborating with the prosecutor in concealing the evidence presented here. {Attorney Meyer stated that; Mr. Rivera also contends that the alleged victim in the case had a “pattern” of making false allegation s against other adults and that I was negligent in not presenting that evidence to the jury. I do recall that Mr. Rivera was under this impression while the case was pending but I was unable to discover any admissible or relevant evidence in that regard.} SEE EXHIBIT # 2 PG. Para.3

Here defense counsel admits that his client insisted on the existence of the specific evidence during his incarceration but that he was unable to discover any admissible or relevant evidence in that regard. The evidence suppressed at trial, although it was not weighed by the trier of facts, for any finding of fact or conclusion of law, nor brought up at any omnibus prior to trial, was obvious in similarity of the accusation, conduct, untruthfulness, could have created doubt on credibility and improper influence, not remote in time, and had an abundance of witnesses to the malicious actions of the child and mother. Which if the information was known to such an experience trial lawyer as Mr. Meyer, its presentation to the jury would have attacked the credibility and truthfulness of state witnesses and would have created a reasonable doubt, but impeachment was impeded due to concealment and suppression by the state, and the ineffectiveness of counsels conduct which so undermined the proper functioning of the adversarial process.

Of course the failure by the state to disclose such vital evidence early in the process in violation of CrR 4.7 lead defense counsel to appear at trial empty

handed, with just a denial defense which in any case could have still been supported by the evidence presented here, the same evidence that existed then. Defense counsel and the trier of facts were left unable to present proof of whether the evidence being suppressed was false or true, or influenced or whether the prior accusations were admissible to impeach the credibility of the complaining witness.

The acts of misconduct by the state created a void that caused representation to fall below the objective standard of reasonableness. Counsel had no objective he only presented what information he was given by the prosecutor and ignored the information he was given, by his client who denied the charges for nine months and insisted on the existence of evidence of malice. The state deprived counsel and defendant of vital impeachment evidence, blocking them from attacking the credibility of witnesses and presenting a complete defense.

This action by the state does not relieve the defense counsel from his duty of loyalty owed to his client. The representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant and hence counsel owes the client a duty of loyalty, duty to avoid conflicts of interest From this function as assistant to the defendant derives the duty to advocate the defendants' cause, to consult with the defendant on important decisions and to keep the defendant informed of important developments. He has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Powel v. Alabama 287 U.S, at 68-69, 53 S.Ct. at 63-64.

In Rivera's case defense counsel was informed about the evidence of the prior false accusations, the names of the people involved, the police reports and where to find them, yet counsel ignored Rivera's interest in finding the evidence to support his defense of non occurrence of the charges against him. At no time did counsel ever comment on finding or even looking for any of the evidence requested by his client.

In any case presenting an ineffectiveness claim the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Here the circumstances surrounding Rivera's accusations and trial

were in jeopardy not only because the state was concealing the evidence but also because counsel did not prepare a proper defense, no evidence in support, or witnesses, was not looking for it and continued to ignore his client.

A fair trial is one in which evidence is subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceedings. Here there was no resolution in advance the evidence never surfaced an action not done in Rivera's case denying him a fair trial. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. Unites States ex rel. McCann, 317 U.S. 269,275, 276,63 S.Ct. 236,2,240, 87 Led. 268 (1942); see Powell v. Alabama 287 U.S. at 68-69, 53S.Ct. 63-64. The statement presented here; counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which I am entitled. Shows that counsel is bound to his client through his duty to loyalty to try to find and present any and all favorable material that can help the client, whether it comes from the prosecutor or his duty to present his clients side of the story, a duty which in Rivera's case is misplaced.

WEBSTERS defines opportunity as; a favorable or advantageous combination of circumstances;

In this appellants case the opportunity was presented to defense counsel but he ignored me, Rivera begged his counsel to please find the evidence of the prior accusations for eight months, which would have been favorable to my defense, material, relevant, and impeaching. The presentation that the child and mother were carrying out these malicious acts was an advantageous combination of impeaching evidence that could show prior accusations and improper influence, circumstances which in this case the accusations against Rivera and others and would have created a powerful defense showing similar accusations by both. A defense with the strength to create a reasonable doubt had it been used to

attack the credibility of the witnesses. To not investigate this evidence was not sound strategy under prevailing professional norms

Counsel also retained defense investigator Paula Howell to have an interview with Rivera in January of 2006 (See Exhibit # 1) this interview happened after Rivera refused to sign his fourth continuance. Rivera told Howell about the same evidence he requested from Mr. Meyer, after the interview I signed the continuance with the hope that she would find the evidence. That was the first and last time that I saw Paula Howell and never heard anything about any investigation or finding of my evidence. I believe she was sent just to get me to sign the continuance.

The Courts have recognized that “the right to counsel is the right to effective assistance of counsel”. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d763 (1970). Effective assistance can be defined as a counsel who tries to validate the side of his clients’ story, an attempt to prove that his client is innocence by any available means, and tries his best to present a defense at trial. But when counsel becomes so largely dependent on the prosecutor to provide evidence “as to say under the Brady rule” the defense counsel could overlook and even fail to investigate vital facts provided by his client and can be easily manipulated, blinded, and misled by the prosecutor while he is waiting for the prosecutor to facilitate his duties in the finding of evidence.

In exhibit # 2 Attorney Meyer states to the Bar Association that; Mr. Rivera also contends that the alleged victim in the case had a “pattern” of making false allegation s against other adults and that I was negligent in not presenting that evidence to the jury. I do recall that Mr. Rivera was under this impression while the case was pending but I was unable to discover any admissible or relevant evidence in that regard.} SEE EXHIBIT # 2 PG. Para.3

This statement by defense counsel shows his knowledge of the acts and evidence that his client requested for eight months. Reasonableness would lead an effective counsel to at least try to find or verify the evidence to which his client is so specifically stating or requesting in an effort to collaborate his client story and to guard his rights.

Reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions possibly leading to facts that support a certain potential line of defense when counsel is aware of the information given to him by his client. Counsel's actions are usually based, quite properly on informed strategic choices made by the defendant and on information supplied by the defendant. In short, inquiry into counsel's conversation with the defendant may be critical to a proper assessment of counsel's other litigation decisions, See United States v. Decoted at 372-373, 624 F.2d at 209-210. Here even the Denial defense would have been supported by the evidence had counsel investigated.

In the same statement he recalls that Mr. Rivera was under this impression while the case was pending but I was unable to discover any admissible or relevant evidence in that regard.

This impression, which consisted of very specific information given to defense counsel and his investigator, seem to be nothing more to counsel but an impression that was dismissed without investigation, leading defense counsel to present an unsupported denial defense. It is this impression that materialized at trial when the prosecutor presented the evidence and suppressed it. SEE exhibit #3 RP 53

In Exhibit # 3 RP 53 at 16 defense counsel Meyer is slapped in the face with the same specific evidence requested by Rivera during his entire incarceration. What defense counsel considered an impression, was presented as hard facts. Defense counsel, acting over his clients' objections, agreed and allowed the suppression of the evidence.

Reasonableness would move an effective counsel to scream out a discovery violation on behalf of his client, in light that he is being surprised by material evidence that as he claims was unknown to him, at this time he was made ineffective by the presentation of what would have been New evidence. What presents a clear and careless disregard for the rights of his client, is the fact that counsel was well aware that the evidence was the same evidence requested by

Rivera and that he allowed the suppression, denying Rivera his right to cross-examine the state witnesses.

In a quote from the Supreme Court in California v. Green 399 U.S.159, 90 S.Ct 1936, states that this practical truth {the importance of immediate cross-examination is daily verified by trial lawyers, not one of whom would willingly postpone to both a later date and a different forum his right to cross-examine a witness against his client.” People v. Johnson 68 Cal. 2d 646,655,68, Cal.Rptr. 599, 606,441 P2d111, 118, (1968), cert. denied, 393 U.S.1051, 89 S.Ct. 679, 21 Led2d, 693 (1969)

Rivera has presented the fact that at no time did he ever waive his rights, he plead not guilty and insisted to his counsel that his constitutional rights be exercised. Through the evidence presented here Rivera shows that for counsel unreasonable acts fell below reasonable standard, he assisted to, and violated Rivera’s constitutional rights up to the point of trial. Rivera’s expressed desire to confront the witnesses against him and to be able to exercise his rights guaranteed under the Sixth Amendment was obvious but ignored.

In Brookhart v Janis 86 S.Ct. 1255(1966), the courts determined wether petitioners constitutional rights to be confronted with and to cross-examine the witnesses against him was denied. Brookhart v State of Ohio, 382 U.S.810, 86, S.Ct. 104,15,L.E.d 2d 59. Here the court stated that if there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

The Sixth Amendment provides that; in all criminal prosecution, the accused shall enjoy the right to e confronted with the witnesses against him. And in Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 1069, 13 L.Ed.2d2923 the court held that the confrontation guarantee of the Sixth Amendment including the right of confrontation “is to be enforced against the States under the Fourteenth

Amendment according to the same standards that protect those personal rights against federal encroachment “ Malloy v Hogan, 78, U.S. 1, at 10, 84 S.Ct. {1489} t 1495 12 L.Ed.2d 653 } See also Douglas v State of Alabama, 380 U.S. 415, 85, S.Ct. 1074, 13 L.Ed.2d 934. It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied.

The question in Brookhart was narrowed down to whether counsel has the power to enter a plea, which is inconsistent with his clients, expressed desire and thereby waive his client’s constitutional rights to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. The court held that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances

The fact that counsel knowing his client desire to go to trial and confront the witnesses against him and to effectively cross-examine those witnesses with the evidence he knew existed was the most obvious of intentions. Counsel action to allow suppression without question was a Denial of his own clients right to confront and to cross-examine under the Sixth Amendment. An act of unreasonable prejudice, falling below reasonable standards.

For the second part there must be a “reasonable probability that for counsels unprofessional errors, the result of the proceedings would have been different” Strickland v. Washington 466 U.S. 668, 694, 104 S.Ct. 2053, 80 LEd 2d. 674 (1984) the United States Supreme Court has defined reasonable probability as “a probability sufficient to undermine confidence in the outcome” but defendant need not show that counsels deficient conduct more likely than not altered the outcome of the case 466 U.S. at 693.

The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiency in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment context, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

The appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v Agurs*, 427 U.S., at 104, 112-113, 96 S.Ct., at 2397, 2401-2402, and in the test for materiality of testimony made unavailable to the defense by the Government deportation of a witness, *United States v Valenzuela- Bernal* 558 U.S., at 872-874, 102 S.Ct., at 3449-3450. The defendant must show that there is a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In the case of this petitioner, Defense Attorney Samuel Meyer was informed of vital specific information, which was relevant and material to Rivera's case. The information supplied from the time of his incarceration by Rivera to his counsel, consisted of similar prior false accusations by the child (Mariah Maninger) and recorded false reports of other similar complaints filed by the mother (Melissa Marney) with the Lacey Police Dept.

The information presented seven people being accused by both child and mother in a span of eight weeks. Accusations of factual similarity, material and relevant to the case and beneficial to attack the credibility of the witnesses. It is counsels' own admittance to the Bar Association nearly two years after Rivera's trial that presents the proof that the circumstance surrounding Rivera's case called for this evidence to have been used for a defense. The evidence could have supported even the defense that was presented by counsel, a denial defense.

Many jurors would regard a set of similar past charges by the girl, if shown to be false, as very potent proof. This evidence vital to build a defense against the charges is completely ignored by counsel. In *White v Coplan*, 399 F. 3d 18, 24 (1st CIR. 2005) *White* is limited to the "factual similarity" context, and to proof by cross-examination and not extrinsic evidence. The state of Washington also seems

to recognize the potential for false accusation evidence to serve as substantive proof. ...Evidence tending to establish a party's theory or to qualify or disprove the testimony of an adversary, is always relevant and admissible.

The fact that in Rveras' case the presentation of his theory was never believed enough to be investigated by his own counsel, made it easy for the prosecutor to manipulate and conceal the evidence until the trial. Here counsel's failure to investigate meant the loss of evidence that never made it to trial including the direct evidence that would prove the prior false accusations found to be false by; these individuals.

(1) Jack Marney, stepfather of the child (Mariah).

MR. Marney confronted the neighbor (an adult with mental disability) and his parents whom the child accused in July of '05 of molesting her, Marney found the accusations to be false. Mr. Marney also appears in both police reports made by his estrange wife and mother of the child, Melissa Marney, in July and twenty days later in August of '05 making similar accusations as her daughter. Malicious act he is very aware of.

(2) The schoolteacher and principal that found that Mariah was lying about a fellow student touching her breast, this caused Mariah to be suspended from school in June of '05. Her father Mike Maninger was aware of the situation.

(3) The neighbor who on the day of Mariah's accusation against Rivera, had watched Mariah and her brother Victor from 10:30 a.m. until 3:00 p.m. just twenty minutes before they were picked up by the father Mike Maninger.

This neighbor is only mentioned in the probable cause statement, but is mention to defense counsel by Rivera repeatedly in his request that counsel interview these people and that they be brought as witnesses. (4) The Lacey Police officer Jim Esslinger who on July 15, 2005 recorded report #05-4033 on Melissa Marneys accusations of her husband and his friends of child rape, child molestation, child porn, and child porn ring. A false report that resulted in no arrest.

(5) The seven Lacey Police officers that twenty days later on August 5, 2005 were dispatched to Rivera's apartment that he shared with Jack Marney. This report 05-

44-58 shows that Melissa was arrested on this occasion for false report against Rivera including allegations of assault, rape, car theft, and molestation.

It is generally recognized and accepted that the right of compulsory process is not merely a procedural one conferring subpoena authority, but a substantive one, permitting the presentation of evidence congruent with (if not more extensive than) that raised on cross-examination. Taylor v. Illinois, 484, U.S. 4000 (1988). The loss of such material evidence that was relevant to the defendants case not only deprive Rivera of a proper defense consistent with the allegations against him but it also deprived the Judge and the Jury from these true facts within the knowledge of the state and the proof they never heard or saw. Would their decision be the same had they been aware of this evidence?

The prejudice is clear in which Rivera followed counsel into trial without any proof of his innocence, nothing but his own testimony. No support from the witnesses to the prior acts, that were not subpoena, no police report to show influence, absolutely nothing.

Counsels choice to not use the evidence at trial to make a powerful cross-examination was devastating, even though he was unable to make a showing of proof the evidence could have been used at cross-examination. Counsels only motions to the court were to sever and the evidence could have supported even this motion.

Whether rooted in directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Washington v Texas, 388,U.S. 14, 19 (1967).

Here defense counsels duty to defend his client was not only misplaced in his dependency on the prosecutor to provide the defense with information, but is also manipulated to the point that defense counsel fails to investigate on his own the information given to him by his client, when he obviously believes that if the state has not provided the information requested "it must not exist." Thus, denying Appellant his Constitutional Right to Effective Counsel.

48. Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest. State v Visitacion, 55Wash. App. 166, 173-74, 776 P. 2d. 986 (1989), Dorsey v King Cy., 51 Wash. App. 664,674-675, 754 P. 2d.1255, Review denied, 111 Wash 2d. 1022 (1988), State v Byrd 30 Wash.App. 794, 799-800, 638 P.2d. 601 (1981), State v Jury, 19 Wash. App. 256-264, 576 P 2d.1302 Review denied, 90Wash 2d. 1006 (1978)

CONCLUSION

Appellant by way of the Court records, Transcript, Newly Discovered Evidence has shown by the preponderance of the evidence that the Prosecution, and the trial court has denied him his right to a fair Trial under the Sixth Amendment to the United States Constitution.

Further that the Suppression of Material Evidence in a criminal case, that has cost Appellant his Freedom, and Liberty is Gross Miscarriage of justice, and that the Conviction and Sentence must be reversed and dismissed with PREJUDICE.

Respectfully Submitted

Dated this 19 day of January 2010

Rafael Rivera

Rafael Rivera #893330

Cedar Hall G-11

Washington Correction Center

P.O. Box 900

Shelton, WA. 98584

Exhibit 1
Notes of
Paula Howell

First Notice

Public Disclosure Request

TO: Paula Howell Investigations
P.O. Box 1212
Olympia, Wa 98507-1212

DATE: 12-18-07

RE: Requesting copies (certified) of notes taken
during interview with Rafael Rivera January 2006

DEAR ^{MS} Howell:

I am requesting a certified copy of the
notes taken by you at the Thurston County Jail
in January 2006. My name Rafael Rivera my
attorney at the time was Samuel Meyer.

Thank you

Rafael Rivera

It is hereby requested of you to provide the abovesaid information pursuant to the Public Disclosure Act, RCWA 42.17.010 et seq. your agency shall make these items available for inspection or copying within five days, without cost pursuant to RCW 42.17.300, or give just cause for refusing to do so.

Respectfully Submitted,

Rafael Rivera 893370
Cedar Hall C-11
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Certificate of Proof of Service

Paula Howell hereby depose and declare or certify that on this day a true and accurate copy of the document to which this certificate is affixed was mailed to the party and address listed in the header of this letter under the pains and penalties of perjury under the Laws of The State of Washington.

Signed in Olympia, Washington this 3rd day of January, 2008.

Paula Howell

1/13 Int w/ Rivera - She never
1.0 resch'd T for 3/6 - come back!

Response to
Paula's Question
derived from
Lacey Police Rep.
05-4458
Pg. #1

never raped mom - had
sex w/ her maybe 2x - mom
had multiple partners around
that time

mariah was w/ her maybe
1/2 hr while waiting for her dad
to pick her up

day he was int'd he used
meth + had been up for a
few days - used @ 2 hrs before

Stephanie - was watching her -
had a beer - Steph took a pack
of cigs from Angela + hid it -
saw her take \$5 from Angela -
he didn't say anything - Steph
told him @ bad home life - dad's
friends + watching tapes of
dad + Melissa - Mike is her dad -
she later claimed Mike ~~did~~ molested
her cuz she didn't get her truck

Pg. 2

melissa claimed she split up w/ Jack cuz of addiction to child porn - John, a friend of Jacks, gets this idea that Jack molested John's son - melissa fed into this - John slept w/ melissa (July 4th) - melissa was molested as a kid + told John stories @ her mom making her give head to dad - made John mad + he wanted to kill her mom + Jack - later she tells cop that John threatened to kill -

he's been the middle man for melissa + Jack + would transport River back + forth - she made a believe Jack was molestor so he wouldnt leave River w/ Jack alone -

officer Jim Esslinger
AKA
Kimo

this was the name I used to find Lacey
Police Ref. # 05-433

doesn't know John's last name -
cop was 'Chemo' w/ TESO - he was
(old friend of DS ex + melissa
→ who melissa made start to

When he went to Harry's market ~~melissa~~ manna went w/ him - they also took cat - at store bought pop + chips + icecream for her - paid w/ debit card belonging to friend - doesn't want to say who it is - was going to McD's but didn't + she got ~~messed~~ mad @ it -

D may have called her a hottie cuz they were watching teenage show + everyone on show was a hottie to her so he called her that name -

other girls are ex's daughters -
Norma = ex (D + she have son)

new case = Timmy Russell -
mom = melissa Curtis

melissa tells Timmy's stepdad ^{Charles Laughlin?} that she's going to take D down - this was @ 2 weeks before - she was calling everyone + was telling them anything to make D look bad -

Δ + Norma don't get along well unless they're getting high together - the girls have gone to Angela's w/ him + to his house but not often - girls' dad died last march

8/1 Norma accused Δ of taking son out of daycare w/o permission - Norma had gone to Seaside - Δ waited for her but she didn't show up - he went home + couldn't reach her - she filed a TRO saying Δ threatened to take son to caribbean + stole him out of daycare -

manah was wearing?

the night before melissa took him out for beer - Pints + Quarts - she calls Jim who meets them (who she's seeing) - ~~they~~^{Jim + melissa} went to Angela's house + Δ goes home - next day he goes to make sure she gets up for new job -

that day mariah is wearing
the same shorts + t-shirt mom
had been wearing night before -
Jim + melissa had sex, he thinks

Melissa + Angela are like
foster sisters - Angela's parents
fostered melissa

friendfinders.com is something
melissa + Jack have gotten in to
↑
nickname = wildflower

Exhibit 2
Statement of
Atty Samuel Meyer



WSBA

OFFICE OF DISCIPLINARY COUNSEL

Felice P. Congalton
Senior Disciplinary Counsel

April 30, 2008

Rafael Rivera
#893330
Cedar Hall G-11
Washington Corrections Center
PO Box 900
Shelton, WA 98584

Re: WSBA File: 08-00261
Your grievance against lawyer Samuel G. Meyer

Dear Mr. Rivera:

We received the enclosed information dated April 25, 2008 from Mr. Meyer.

Under the Rules for Enforcement of Lawyer Conduct, we are providing the information to you. A Review Committee of the Disciplinary Board will consider the information.

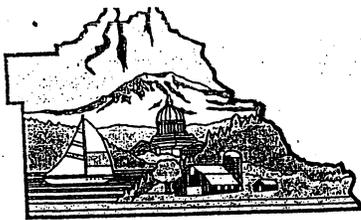
Sincerely,

A handwritten signature in cursive script, appearing to read "Felice P. Congalton".

Felice P. Congalton
Senior Disciplinary Counsel

Enclosure

cc: Samuel G. Meyer
(without enclosure)



THURSTON COUNTY
WASHINGTON
SINCE 1852

OFFICE OF ASSIGNED COUNSEL

Sally Harrison, Director

April 25, 2008

Felice P. Congalton
Washington State Bar Assoc.
Senior Disciplinary Counsel
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2573

RECEIVED

APR 28 2008
WSBA OFFICE OF
DISCIPLINARY COUNSEL

Re: WSBA File: 08-00261
Grievance filed by Rafael Rivera

Dear Ms. Congalton,

On February 19, 2008, I received a copy of a letter that you had sent to Rafael Rivera indicating that the grievance that he filed against me had been dismissed. On April 4, 2008, I received a letter from you indicating that Rafael Rivera is disputing the dismissal of the grievance. In that same letter you strongly encouraged me to respond to the grievance if I had not already done so. Please consider this letter a response to Mr. Rivera's grievance.

Before addressing Mr. Rivera's allegations, however, a brief description of the procedural background may be helpful to the review committee. On August 11, 2005, an information was filed in Thurston County Superior Court charging Rafael Rivera with 2 counts of child molestation in the first degree. (Exhibit A) Both counts listed the same person as the victim. Probable cause for the charges was found based on the declaration of prosecutor supporting probable cause filed on August 9, 2005. (Exhibit B) Mr. Rivera was arraigned on August 24, 2005 and trial scheduled for October 17, 2005. (Exhibit C) I was appointed to represent Mr. Rivera on August 25, 2005. (Exhibit D)

On September 15, 2005, a first amended information was filed in Thurston County Superior court which alleged five counts of child molestation in the first degree. (Exhibit E) The five counts in the first amended information alleged three separate victims.

On September 29, 2005 and order was entered continuing the trial to January 9, 2006. (Exhibit F) On January 9, 2006, and order was entered continuing the trial to March 6, 2006. (Exhibit G) On March 6, 2006, an order was entered continuing the trial to April 3, 2006. (Exhibit H) Throughout all of



these continuances, Mr. Rivera was incarcerated in the Thurston County jail. He signed all of the continuances.

This case was tried on April 3 through 6, 2006. Mr. Rivera testified in his defense and was convicted on all charges. He was sentenced on May 16, 2006 to 198 months to life in prison. (Exhibit I) Mr. Rivera appealed and on July 3, 2007, division II of the Washington State Court of Appeals affirmed his convictions. (Exhibit J)

I will attempt to address all of the complaints raised about me in Mr. Rivera's seven page type written statement. Mr. Rivera initially complains that he was not aware of the police reports in his case. I met with Mr. Rivera in the Thurston County jail on numerous occasions and we discussed the nature of the allegations in great detail and I always understood him to be well aware of the nature of the allegations that were being made about him.

Mr. Rivera also contends that the alleged victims in this case had a "pattern" of making false allegations against other adults and that I was negligent in not presenting that evidence to the jury. I do recall that Mr. Rivera was under this impression while the case was pending but I was unable to discover any admissible or relevant evidence in that regard.

X
*What about
Discovery Show*

Mr. Rivera also expresses frustration over how long it took for this case to go to trial. It is true that this case was continued several times. It is also true that Mr. Rivera signed off on the agreed orders of continuance. The case was continued for essentially two reasons. First, I experienced a certain amount of difficulty in obtaining interviews with the three children who had made the accusations against Mr. Rivera. I did tell Mr. Rivera that I was not comfortable proceeding to trial in a case of this sort without interviewing all complaining witnesses before trial.

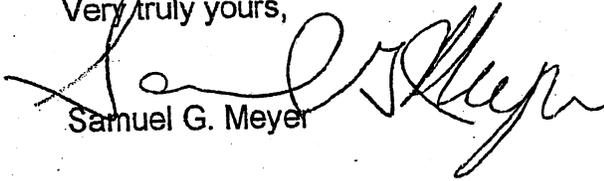
Second, I did put a great deal of effort into attempting to resolve this case short of trial. I was very concerned about proceeding to trial and having a jury hear three different children make accusations against Mr. Rivera. Although I filed a motion asking the trial court to sever the case and have separate trials for each victim, I was aware that there was legal justification for the trial court to deny that motion and require Mr. Rivera to have one trial with all three complaining witnesses. It remains my opinion that multiple child complaining witnesses at a single trial presents a significant hurdle for a defendant. The trial court did deny the motion to sever and that decision was affirmed by the Washington State Court of Appeals. In any event, although we came close to an agreement, Mr. Rivera ultimately turned down all deals and we proceeded to trial.

Finally, Mr. Rivera also suggests that I somehow cooperated with the prosecutor in this case and in so doing committed some sort of fraud. That is simply not the case. As a staff attorney in a public defense agency, I have long

recognized that in most cases, the prosecutor and the police enjoy a huge advantage. I also understand and have experienced the perception from clients and from citizens that attorneys who work in public defense are something less than "real lawyers." Victories in my area of practice are hard earned, incredibly rewarding and not as frequent as I would like them to be. I do understand that he is not happy with the final disposition in his case but I was not an "accomplice to fraud."

I believe that I have answered the concerns expressed by Mr. Rivera in his complaint. If the committee wishes any further information from me please do not hesitate to contact me.

Very truly yours,



Samuel G. Meyer

SGM/sm

Exhibit 3

Motion in
Limine to Supp.
evidence.

A P P E A R A N C E S

For the Plaintiff: Christy Peters
Deputy Prosecuting Attorney
2000 Lakeridge Drive SW
Olympia, WA 98502

For the Defendant: Samuel Meyer
Office of Assigned Counsel
1520 Irving Street
Tumwater, WA 98512

T A B L E O F C O N T E N T S

EXAMINATION

<u>Plaintiff's witness</u>	<u>DX</u>	<u>CX</u>	<u>RDX</u>	<u>RCX</u>
Michael Maninger	59	67	71	*
Mariah Maninger	74	92	100	*
Det. Shannon Barnes	102	*	*	*
Det. Jeremy Knight	117	139	151	154

INSTRUCTIONS AND MOTIONS

<u>Type</u>	<u>Page</u>	<u>Ruling</u>
State's motions in limine	52-55	52-55

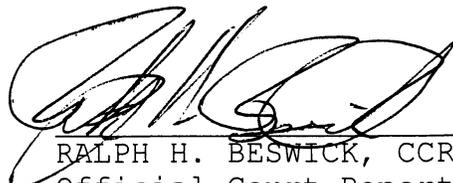
CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript and that the transcript is a true and complete record of my stenographic notes.

Dated this 14th day of August, 2006.



RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023

1 (Jury out.)

2 THE COURT: Good afternoon.

3 MS. PETERS: Good afternoon, your Honor.

4 MR. MEYER: Good afternoon, your Honor.

5 THE COURT: I understand that we have
6 something that we need to address before the jury
7 joins us..

8 MS. PETERS: Just briefly, your Honor.
9 Mr. Meyer had an opportunity to just talk to the --
10 one of the state's witnesses today. Based on that
11 Mr. Meyer and I had a short discussion about some of
12 the testimony, and I would like to make an oral
13 motion *in limine* regarding a couple issues that
14 Mr. Meyer and I have agreed to at the current time.
15 If something changes, we'll bring it back before the
16 Court.

17 The first issue is regarding another potential
18 victim of the defendant that occurred approximately
19 five or six years ago. Stephanie Maninger, who's now
20 20 years old and was 14 at the time, there was an
21 investigation by the Lacey Police Department
22 regarding an allegation of the defendant. The
23 circumstances surrounding that allegation of sexual
24 abuse are different from the facts before the Court,
25 and for that reason at this time I'm agreeing to not

1 make any mention of that offense on Stephanie. Of
2 course, if the defendant at a later time chooses to
3 take the stand and make any statements, potentially
4 that issue may need to be re-addressed.

5 THE COURT: Mr. Meyer.

6 MR. MEYER: I don't have any problem with
7 that, your Honor. We discussed that. I would have
8 moved to keep that out.

9 MS. PETERS: The next issue --

10 THE COURT: Just let me say, I'll grant that
11 motion *in limine* subject to the explanation that was
12 given. It wouldn't necessarily come in automatically
13 if he takes the stand, but if he testifies in a
14 certain way it then could be used for impeachment
15 purposes, but I'll grant the motion, yes.

16 MS. PETERS: The next matter, your Honor, is
17 regarding other touching that Mariah Maninger
18 disclosed regarding being touched on her chest by a
19 classmate at school, peer-age classmate at school,
20 and by a developmentally delayed neighbor in the
21 neighborhood. Both of these incidents were separate
22 and apart from the defendant's case. Both of these
23 incidents had actually different factual patterns
24 than the defendant's case and would not be relevant
25 for the case and I'm asking that that also not be

1 brought up.

2 THE COURT: Mr. Meyer.

3 MR. MEYER: No objection, your Honor.

4 THE COURT: All right. That motion is
5 granted.

6 MS. PETERS: The next --

7 THE COURT: Oh, there's another one.

8 MS. PETERS: Two more issues, your Honor.

9 The third regarding a no-contact order that Angela
10 Rivera has against the defendant that occurred prior
11 to this case taking place. Mariah Maninger knew
12 about that no-contact order and mentioned it during
13 her interview, and I have instructed her not to talk
14 about that no-contact order unless it comes up again
15 from either later evidence or the defendant taking
16 the stand and testifying in a certain way.

17 THE COURT: All right. Mr. Meyer.

18 MR. MEYER: No objection to that, your Honor.

19 THE COURT: All right. Granted.

20 MS. PETERS: The last issue, your Honor, is
21 regarding an arrest of Melissa Marney, who is the
22 mother of Mariah Maninger, and it occurred in the
23 same time period, but regard -- as the allegations --
24 within a few days of the allegations and disclosure
25 by Mariah to her father, Michael Maninger, but it's

1 not connected directly to the allegations of the
2 defendant sexually abusing Mariah. Melissa Marney is
3 not going to be a witness. She is not on either
4 witness list for the state or the defense, and at
5 this time I don't believe there would be any
6 probative value and it would be more prejudicial than
7 relevant for those facts to be brought up.

8 THE COURT: Mr. Meyer.

9 MR. MEYER: No objection, your Honor.

10 THE COURT: All right. Granted.

11 MS. PETERS: With that, your Honor, the state
12 is ready to proceed.

13 THE COURT: Mr. Meyer, do you have anything
14 further?

15 MR. MEYER: Nothing further, your Honor.

16 THE COURT: All right. Let's have the jury
17 join us.

18 (Jury enters.)

19 THE COURT: All right. Ladies and gentlemen,
20 you'll recall this is the time I'd give you the
21 second oath so if you'd please raise your right
22 hands. Do you solemnly swear or affirm under law
23 that you will well and truly try this case brought by
24 the state against the defendant, Rafael Rivera, and
25 render a verdict according to the evidence and

Exhibit 4

Lacey Police

Report #

05-4458

Public Disclosure Request

TO: Records Dept
Lacey Police Dept.
420 College St SE
Lacey, WA 98503

DATE: 8-7-07

RE: Disclosure of Police Reports

DEAR Sir or Mam:

I am requesting copies of the arrest records
of Melissa Marney on August 5, 2005. All police
reports on that matter which include the
arrest of Melissa Marney for false reports
against myself Rafael Rivera on the night of
August 5, 2005. Also Police Reports of her daughter
Meriah Maninger from Aug. 05, 2005 to 2006.
If not, please inform me how I can obtain such
reports. I understand there are copy fees and I
agree to pay.

It is hereby requested of you to provide the abovesaid information pursuant to the Public Disclosure Act, RCWA 42.17.010 et seq. your agency shall make these items available for inspection or copying within five days, without cost pursuant to RCW 42.17.300, or give just cause for refusing to do so.

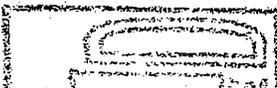
Respectfully Submitted,

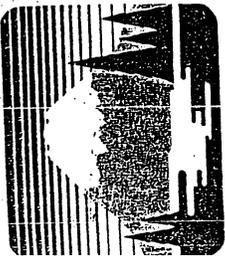
Rafael Rivera
[Signature]

Certificate of Proof of Service
I, Rafael Rivera, hereby depose and declare or certify that on this day a true and accurate copy of the document to which this certificate is affixed was mailed to the party and address listed in the header of this letter under the pains and penalties of perjury under the Laws of The State of Washington.

Signed in Everett, Washington this 7 day of August, 2007.

ISI [Signature]





LACEY POLICE DEPARTMENT
P.O. BOX 3400
Lacey, Washington 98509-3400



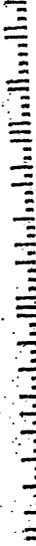
02 1A
0004316192
MAILED FROM ZIP CODE 98503

\$ 00.58⁰⁰

AUG 23 2007

RAFAEL RIVERA 893330
CEDAR HALL 9-11
~~WASHINGTON CORRECTION CENTER~~
P.O. BOX 900
SHELDON, WA 98584

98584\$0974 8500





Shaping
our community
together

CITY OF **LACEY**

POST OFFICE BOX 3400
LACEY, WA 98509-3400

CITY COUNCIL

VIRGIL S. CLARKSON
Mayor

NANCY J. PETERSON
Deputy Mayor

ANN BURGMAN

JOHN DARBY

MARY DEAN

THOMAS L. NELSON
GRAEME SACKRISON

CITY MANAGER

GREG J. CUOIO

August 22, 2007

Rafael Rivera 893330
Cedar Hall G-11
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

RE: Public Disclosure Request
Lacey Police Case Number: 2005-4458

Dear Mr. Rivera,

Enclosed is a copy of the public record(s) you requested. We have released the portions of the record which are not exempt from disclosure by RCW 42.56.210 and/or other statutes. Information redacted is exempt from public disclosure for the following reason (s):

- Complainant's, victim's or witness' right to non-disclosure RCW 42.56.240.
- Record contains information the non-disclosure of which is necessary for the protection of a person's right to privacy RCW 42.56.230 or 42.56.240 as defined by RCW 42.56.050.

If you believe that the information furnished has been incorrectly redacted or is incomplete, you may file a written appeal with the Chief of Police within seven business days from the date of this letter. The appeal must include your name and address, a copy of the redacted document and a copy of this letter, together with a brief statement identifying the basis of the appeal. Please mail or deliver your appeal to the Lacey Police Department. Our mailing address is PO Box 3400, Lacey WA, 98509-3400. We are located at the Lacey City Hall, 420 College St. SE. Our email address is lacypolice@ci.lacey.wa.us.

Sincerely,

Emily Logsdon
Police Assistant II



TDD Relay
1-800-833-6388

City Council
(360) 491-3214

City Manager
(360) 491-3214

City Attorney
(360) 491-1802

Community Development
(360) 491-5642

Finance
(360) 491-3212

Park & Recreation
(360) 491-0857

Police
(360) 459-4333

Public Work
(360) 491-5600

Fax #
(360) 438-2669



Lacey Police Department Crime and Incident Report Disclosure <input type="checkbox"/> Y <input type="checkbox"/> N	ADULT <input checked="" type="checkbox"/>	JUVENILE <input type="checkbox"/>	Domestic Violence <input type="checkbox"/>	Case Number	2005-4458
				Other Related Number(s)	

Incident Information

Reported Date and Time				Occurred From Date and Time				Occurred To Date and Time			
Month	Day	Year	Time	Month	Day	Year	Time	Month	Day	Year	Time
08	05	2005	0121	08	04	2005	2330	08	04	2005	0256

Incident Class	Location of Incident	Premise Type or Name
Assault---1051	4429 16 th Ave SE	One Story house--01

Charges	RCW or LMC Number	RCW or LMC Statute Description	Checked Box	Checked Box	Count
1	9A.36.021.A	Attempted Assault 2 nd	<input checked="" type="checkbox"/> RCW	<input type="checkbox"/> LMC	1
2	69.50.401	UPCS-Methamphetamines	<input checked="" type="checkbox"/> RCW	<input type="checkbox"/> LMC	1

Check Box All Applies

Computer related Victim <input type="checkbox"/> Offender <input type="checkbox"/>	Alcohol Related Victim <input type="checkbox"/> Offender <input type="checkbox"/>	Drug Related Victim <input type="checkbox"/> Offender <input type="checkbox"/>	Gang Related Victim <input type="checkbox"/> Offender <input type="checkbox"/>	Officer Safety Yes <input type="checkbox"/> No <input type="checkbox"/>	Officer Assaulted Yes <input type="checkbox"/> No <input type="checkbox"/>	Weapon Related Yes <input type="checkbox"/> No <input type="checkbox"/>	Domestic Violence Yes <input type="checkbox"/> No <input type="checkbox"/>
--	---	--	--	---	--	---	--

Persons - Business

Codes: C-Complainant, V-Victim, B-Business, W-Witness, RO-Registered Owner, D-Deceased, G-Parent or Guardian										
Subject #	Name (Last, First NMI)					Race	Ethnic	Sex	Date of Birth	Height
V-1	Rivera, Rafael *					H	Y	M	06-27-67	5-01
Weight	Hair	Eyes	Street Address			City		State	Zip Code	
180	BRN	BRN	1025 Neil St NE #30			Olympia		WA	98506	
Home Phone		Work Phone		Resident Status	Hate Basis	Victim Type	Victim Injury	VOR	VOO#	
360-970-2673				N-Not Resident		I-Individual	1-None			

Suspect Subject

Subject Codes: A-Arrest, S-Suspect, M-Missing, R-Runaway, X-Other, I-Instinctualized (Mental Date)										
Subject	Charges	Name (Last, First NMI)				Race	Ethnic	Sex	Date of Birth	Height
A-1		Marney, Millissa A				W	N	F	04-17-68	5-05
Weight	Hair	Eyes	Street Address			City		State	Zip Code	
135	BRN	BRN	4429 16 th Ave SE			Lacey		WA	98503	
Home Phone		Work Phone		Resident Status	Aliases		VOR	Alias Type	Deceased	
				F-Full time	UNK				Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
Social Security #		Drivers License #		State	Business/School		Relationship to Business		Check List	
									Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
Scars-Marks-Tattoos				Citation Number			Where Booked		LPD Booking Photo?	
							TCSO		NO	
Juvenile Parents Name		Notified	By Whom		Date/Time	Statement	Oral	Written	Miranda Date-Time	
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		

Vehicle Information

Check if Suspect or Victim Vehicle: Suspect <input type="checkbox"/> Victim <input type="checkbox"/> Entered in NCIC <input type="checkbox"/>										
License #	State	Lic Type	Year	Make	Model	Color	Style	Vehicle Identification #		

Attachments

Name <input checked="" type="checkbox"/> Evidence Form <input type="checkbox"/> Property Report <input type="checkbox"/> Check List <input type="checkbox"/> Statements <input type="checkbox"/> Gang Card <input type="checkbox"/>										
Officer's Name	Personnel#	Supervisor	Assigned to			Date of Assignment		Disposition		
Landwehrle	477	<i>[Signature]</i>	PROSECUTOR					2		

K.N. SHT
 COPIES TO PROSECUTOR
 DATE AUG 05 2005 ENTERED

Lacey Police Department -Additional Information

Case Number: 2005-4458

Disclosure Y N

Charge	RCW or LMC Number	RCW or LMC Statute Description	RCW	LMC	Counts
3	9a.76.175	Making a false or misleading statement to a public servant	<input checked="" type="checkbox"/> RCW	<input type="checkbox"/> LMC	1
4			<input type="checkbox"/> RCW	<input type="checkbox"/> LMC	
5			<input type="checkbox"/> RCW	<input type="checkbox"/> LMC	
6			<input type="checkbox"/> RCW	<input type="checkbox"/> LMC	

Persons: Business										
Codes: C-Complainant, V-Victim, B-Business, W-Witness, RO-Registered Owner, D-Deceased, G-Parent or Guardian										
Subject W-1	Name (Last, First NMI)				Race	Ethnic	Sex	Date of Birth	Height	
Weight	Hair	Eyes	Street Address			City		State	Zip Code	
Home Phone		Work Phone		Resident Status	Hate Basis	Victim Type	Victim Injury	VOR		VOO

Suspect: Subject										
Subject Codes: A-Arrest, S-Suspect, M-Missing, R-Runaway, X-Other, I-Institutionalized (Mental/ Detox)										
Subject	Charges	Name (Last, First NMI)			Race	Ethnic	Sex	Date of Birth	Height	
Weight	Hair	Eyes	Street Address			City		State	Zip Code	
Home Phone		Work Phone		Resident Status	Aliases		VOR	Alias Type	Deceased Yes <input type="checkbox"/> No <input type="checkbox"/>	
Social Security		Drivers License		State	Business/School		Relationship to Business		Check List Yes <input type="checkbox"/> No <input type="checkbox"/>	
Scars-Marks-Tattoos				Citation Number			Where Booked			
Juvenile Parents Name		Notified	By Whom		Date/Time	Statement <input type="checkbox"/>	Oral <input type="checkbox"/>	Written <input type="checkbox"/>	Miranda Date-Time	

SYNOPSIS:

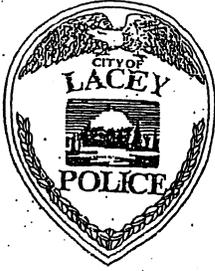
Making False Reports to Public Officers:

1) A person commits the crime of making a false report if he or she willfully makes any untrue, misleading or exaggerated statement in any report to a Police or Fire Department.

2) Making a false report is a misdemeanor.

- If this is a Property Crime: I did not give anyone permission to enter my premises and/or take or remove my property or vehicle.
- I accept liability for towing and storage.
- The name juvenile is presently a runaway.
- The name person is presently missing.

SIGNATURE	PRINT NAME: (Last, First MI)	DATE	TIME	PERSONNEL #
-----------	------------------------------	------	------	-------------



Lacey Police Department
Officer's Report
August 5, 2005 / 08:09

Case Number: 2005-4458

Reporting Officer: K. Landwehrle / #477
Related Number(s): «RelatedNumbers»

Narrative: On August 5, 2005 at approximately 0121 hours Lacey units were dispatched to a burglary now at 4429 16th Ave SE. Radio advised that the reporting party's W-1 just broke into the reporting party's house and took her white four door Dodge vehicle. Radio also advised that the reporting party stated the subject had left and threatened the reporting party with a bat. Radio also advised that the subject took the reporting parties wallet. I arrived at approximately 0123 hours and contacted (A-1) Millisa Marney.

Millisa was very calm and invited Officer Haynes and I into her residence. Millisa sat on a couch in her front room. Next to her I observed a baseball bat and a black metal pipe on the couch.

Millisa stated that she was asleep in her residence. Millisa said she woke up and went to a room on the N/E side of her residence where she found her ex-brother in law (V-1) Rafael Rivera standing in the room. Millisa said that she yelled at Rafael to get out of her house. Millisa said that Rafael then picked up a baseball bat and a black metal bar that were on the couch and then grunted in frustration at her. Millisa said that she was approximately 4 feet away from Rafael when this happened and Millisa said she feared that Rafael was going to hurt her. Millisa said that Rafael then put the baseball bat and black metal bar back on the couch and he then picked up her "day planner" containing her credit cards. Millisa said that Rafael then walked out the front door carrying her "day planner" and got into her four door Dodge Aries and left.

At this time Melissa's cell phone rang and it was (W-1) Millisa told me that W-1 said Rafael was at his residence (1025 Neil St NE #30). I advised radio of this and Lacey and Thurston County units responded to the address and contacted W-1 and Rafael. See Lt. Koehler's report for further specifics.

I asked Millisa if Rafael had a key to the house or her car and she said "I don't know." I then asked her who the register owner of the vehicle was and she said "W-1" I asked Millisa how Rafael got to her residence and she said "I don't know, I was asleep."

At this time I contacted Lt. Koehler via telephone. I advised him of what Millisa had stated. Lt. Koehler then advised that Rafael and W-1 stated that Millisa had picked Rafael up from 1025 Neil St NE #30 and drove him to 4429 16th Ave SE. Lt. Koehler also advised that Rafael had said the baseball bat and black metal pipe where in the white Dodge Aires when he was picked up by Millisa.

I confronted Millisa with this information and she began crying and was very upset. Millisa said she had lied and wanted to tell me the truth. Millisa said that Rafael had raped her on several occasions, however she had never reported the incidents to law enforcement. Millisa said she had to work today and could not find a babysitter so she asked Rafael to baby-sit her small children. Millisa said that after she returned home from work, her ex-husband called her and told her that Rafael had sexually abused her 10 year old daughter at the 4429 16th Ave SE

address earlier in the day. Millisa said she became very upset and mad that Rafael had sexually abused her daughter.

Millisa said she removed the baseball bat and black metal bar from her shed in the back yard and placed them in the Dodge Aires. Millisa said she then drove over to 1025 Neil St NE #30 and picked up Rafael. Millisa said she then drove to Tenino and near the airport looking for "the middle of nowhere." Millisa said she was either going to beat Rafael with the baseball bat and black metal bar or she was going to take all his clothes off and leave him out there because of what he had done to her and her daughter. Millisa said she chose not to do this because she cared about her kids too much. Millisa said she then drove to Safeway on Yelm Hwy SE and called her husband via her cell phone. Millisa said she told her husband she didn't do anything to Rafael. Millisa said she then drove Rafael back to her residence (4429 16th Ave SE).

Millisa said once at the residence she and Rafael sat down on the couch in her front room. She said Rafael then removed her boots and socks and then began massaging her feet. Millisa said she became very upset at this and told Rafael to leave. Millisa said Rafael picked up her "day planner" and walked outside to the Dodge Aires, which was parked in her driveway. Millisa said she followed Rafael and asked him to grab her "things." I asked Millisa what "things" she was talking about and she said her jacket, the baseball bat, and the black metal bar. Millisa said that Rafael handed the items to her and he then left in the Dodge Aires. Millisa said she went inside and called 911 and reported the burglary and theft of the vehicle.

Officer Haynes contacted Lt. Koehler and informed him of Melissa's new statement. Lt. Koehler advised that Rafael had stated that he and Millisa smoked marijuana in the residence and there should be drug paraphernalia in the residence. I asked Millisa for voluntary permission to search and she said "okay." I then completed the voluntary permission to search form and she changed her mind and denied us permission to search.

I then told Millisa she was under arrest. I placed her in handcuffs, double locked and brought her to my patrol vehicle. Lt. Koehler arrived as I was searching Millisa incident to arrest. Lt. Koehler placed a black and tan day planner on the trunk of my vehicle and Millisa said "that's mine." It should be noted that inside the black and tan day-planner was a glass pipe and a baggie containing a white crystal like substance, through my training and experience I recognized this substance to be crystal methamphetamine.

At approximately 0259 hours I read Millisa her Constitutional Rights per my department issued card. Millisa verbally stated she understood her rights and verbally invoked her rights. At this time I stopped all questioning and transported her to Thurston County jail where she was booked for Attempted Assault 2nd degree.

After booking Millisa into TCSO jail I returned to the Lacey police department and prepared the evidence to be logged. I also tested the white crystal substance with a NIK field test kit and it tested positive for methamphetamines. The evidence was secured.

Millisa was arrested for attempted assault 2nd degree because she had the intent to assault Rafael with a deadly weapon (the baseball bat and black metal bar) and she took a substantial step toward the assault by planning the assault out, placing the weapons in her vehicle, and then driving Rafael around looking for "the middle of no where." I am forwarding charges to the prosecutor for UPCS-methamphetamines for the baggie located in Melissa's day-planner. I am also forwarding charges for making a false or misleading statement to a public servant for the statements she made to myself.

LPD Case «CaseNumber»

Reporting Officer: «OfficerName»

Page 3 of 3

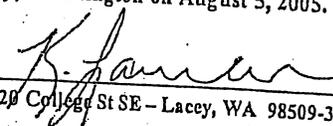
Request prosecutor review this case for UPCS-methamphetamines and also false reporting.

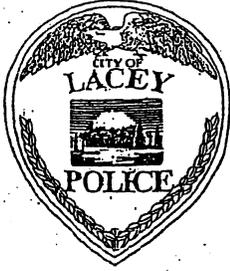
See attached reports and papers.

I certify or declare under penalty of perjury under the laws of Washington that the foregoing is true and correct. This form was completed and signed in Lacey, Washington on August 5, 2005.

K. Landwehrle / #477

Reporting Officer's Signature:

 477
Lacey Police Department - PO Box 3400 - 420 College St SE - Lacey, WA 98509-3400 - Phone 360.459.4333 - Fax 360.456.7798



Lacey Police Department

Officer's Report

August 5, 2005 / 07:57

Case Number: 05-4458

Reporting Officer: Lt. Matt Koehler / #281

Related Number(s):

Narrative: Lacey units were dispatched to a call of a man threatening the caller with a baseball bat, then stealing the caller's car and credit cards. The suspect was known to the caller, Millisa W-1, and she reported that he was staying at 1025 Neil St. NE #30. I responded there along with a TCSO Deputy, Officer Kollmann, and Officer Wenschhof. We waited outside the apartment while Officer Haynes and Officer Landwehrle interviewed Millisa. I located the suspected stolen vehicle, a white Dodge Aries, Washington license 419RUB, in the parking lot of the apartment complex, just east of the building housing apartment #30. Officer Kollmann then made contact with W-1. W-1 told Officer Kollmann that the suspect, Rafeal Rivera, was asleep in a bedroom inside the apartment. With W-1's permission, Officer Kollmann entered the apartment and detained Rivera in handcuffs.

Officer Kollmann read Rivera his rights, and Rivera said he understood and waived them. Rivera told me he had been over at Millisa's, but that she had picked him up earlier in the white Dodge Aries, driven him around in the car for a while, then driven to Safeway on Yelm Highway, then to her home on 16th. Rivera said Millisa did not say much on the drive, and he just thought she was under the influence of drugs. He said Millisa first drove him to an area around Rich Road, but then he did not recognize where they were at until she got to the Safeway. After leaving Safeway, Rivera said they went to Millisa's house on 16th Avenue, where they smoked marijuana together. Millisa then abruptly told Rivera to leave, and to take her car to get home. She unloaded a baseball bat and crow bar out of the vehicle before he left, he said. He did not want to go home yet because he did not want to drive under the influence of marijuana, but she insisted he leave, so he did. He drove home and went to bed.

W-1's apartment for a couple months. W-1 confirmed that Millisa had come over and picked up Rivera, and that Rivera had come in about a half hour or so prior to the police coming to the door. He said Rivera did not seem agitated or upset when he returned home, and went to bed.

I relayed this information over the phone to Officer Landwehrle, who then talked further with Millisa and got her to confess to making up the initial story about the threats and stolen car. See his report for further information.

W-1 is the registered owner of the Dodge Aries, but said Millisa normally drives it. He said Rivera frequently drives it as well. W-1 and Rivera both signed a consent to search form for the apartment and the vehicle. I searched all of Rivera's belongings and did not locate any credit cards belonging to anyone but him, nor did I find the planner Millisa accused Rivera of stealing. With Rivera, I went to the car and immediately saw a black nylon planner on the passenger floorboard behind the drivers seat. I retrieved it from the car, and looked inside. I did not find any identification or credit cards for Millisa. I did find a rolled up white paper towel tucked inside the planner. Inside the paper towel was a clear glass smoking pipe that I recognized from my training and experience as a pipe used to smoke illegal narcotics. I also

LPD Case «CaseNumber»

Reporting Officer: «OfficerName»

Page 2 of 2

found a small Ziploc plastic baggie with green coloring on it. The baggie was rolled up and had a white powder inside, which I suspected to be methamphetamine. I left the items in the planner and seized the planner as evidence. I left the vehicle in the care of Rivera.

I went to Millisa's home, and contacted Officer Landwehrle. He had already taken Millisa into custody and had her in the back of his patrol car. He got her out of the patrol car and I put the planner on the trunk of the car in preparation of handing it over to Landwehrle. As he prepared to search Millisa, she saw the planner and said "That's mine". Millisa had not been mirandized yet, so I did not respond or speak to her. After Officer Landwehrle searched her, he put her back in the car and read her her rights. She invoked, so we did not ask her any more questions. I turned over the planner to him, and he later logged it into evidence.

See Officer Landwehrle's report for further information.

I certify or declare under penalty of perjury under the laws of Washington that the foregoing is true and correct. This form was completed and signed in Lacey, Washington on August 5, 2005.

Lt. Matt Koehler / #281

Reporting Officer's Signature:


Lacey Police Department - PO Box 3400 - 420 College St SE - Lacey, WA 98509-3400 - Phone 360.459.4333 - Fax 360.456.7798

Exhibit #5

Lacey Police Report

05-4033

2nd Notice

Public Disclosure Request

DATE: 9-11-07

TO: Public Disclosure Officer
Cacey Police Department
420 College St. SE. P.O. Box 3400
Cacey, Wa. 98503

RE: Police Reports of Mariah Meninger (a minor)
accusing two people in her neighborhood of molesting
her between Aug 2005 thru April 2006 -

DEAR OFFICER:

I am in search of two police reports
in which the accuser Mariah Meninger (a minor)
accused two other people besides myself of
sexually molesting her. These two incidents
occurred in her neighborhood (16th and College maybe)
one of the people accused was a mentally
retarded boy. Could you please send me
these two reports.
Mother's name: Melissa Marney
Father: Mike Meninger Thank you!

It is hereby requested of you to provide the abovesaid information pursuant to the
Public Disclosure Act, RCWA 42.17.010 et seq. your agency shall make these items
available for inspection or copying within five days, without cost pursuant to RCW
42.17.300, or give just cause for refusing to do so...

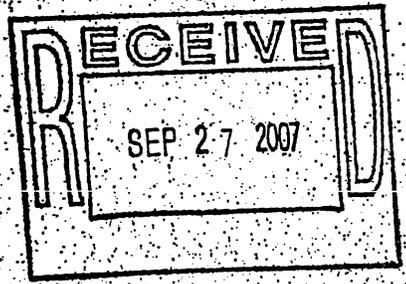
Respectfully Submitted,

[Signature]
Gabriel Rivera

Certificate of Proof of Service
I, Gabriel Rivera hereby depose and declare or certify
that on this day a true and accurate copy of the document to which this
certificate is affixed was mailed to the party and address listed in the header of
this letter under the pains and penalties of perjury under the Laws of The State
of Washington.

Signed in Gabriel Rivera Washington this 11 day of September, 2007

IS/ _____



Public Disclosure Request

TO: Chief Dusty Pierpoint
Lacey Police Dept
P.O Box 3400
Lacey, WA, 98503

DATE: 9-25-07

RE: Second Notice: Police Report on the
testimony of Melissa Macneil Case # 05-4033

DEAR Mrs. Logsdon:

Here is a description of night in question
as close as I can get. The Taunton County
Police Dept. sent me a letter with the case
number on this matter. This number 05-4033

Thank you

It is hereby requested of you to provide the abovesaid information pursuant to the Public Disclosure Act, RCWA 42.17.010 et seq. your agency shall make these items available for inspection or copying within five days, without cost pursuant to RCW 42.17.300, or give just cause for refusing to do so.

Respectfully Submitted,

[Signature]
Rafael Rivera

Certificate of Proof of Service
I, Rafael Rivera, hereby depose and declare or certify that on this day a true and accurate copy of the document to which this certificate is affixed was mailed to the party and address listed in the header of this letter under the pains and penalties of perjury under the Laws of The State of Washington.

Signed in [Signature], Washington this 25 day of September, 2007

ISI _____



Shaping
our community
together

CITY
OF **LACEY**

POST OFFICE BOX 3400
LACEY, WA 98509-3400

CITY COUNCIL

VIRGIL S. CLARKSON

Mayor

NANCY J. PETERSON

Deputy Mayor

ANN BURGMAN

JOHN DARBY

MARY DEAN

THOMAS L. NELSON

GRAEME SACKRISON

CITY MANAGER

GREG J. CUOIO

September 27, 2007

Rafael Rivera 893330
Cedar Hall G-11
Washington Correction Center
Shelton, WA 98584

RE: Public Disclosure Request involving Mariah Meninger and Melissa Marney.

Dear Mr. Rivera,

Enclosed is a copy of case number 05-4033. Please note; various information has been removed due to public disclosure laws, explanations are listed below. In regards to your original request for "the arrest records" involving Melissa Marney, case 05-4033 was not released as there was not an arrest made.

In addition, any cases related to Mariah Meninger cannot be released to you, as she was a juvenile at the time of the incidents. Please refer to RCW 13.50.100(5)(a) and (b) for further information on steps to be taken in order to receive these records.

We have released the portions of the record which are not exempt from disclosure by RCW 42.56.210 and/or other statutes. Information redacted is exempt from public disclosure for the following reason (s):

- Complainant's, victim's or witness' right to non-disclosure RCW 42.56.240.
- Record contains information the non-disclosure of which is necessary for the protection of a person's right to privacy RCW 42.56.230 or 42.56.240 as defined by RCW 42.56.050.
- Record contains information on a juvenile, which is confidential, and may not be released to the public except by court order under provisions listed in RCW 13.50.100(5)(a) and (b).



TDD Relay
1-800-833-6388

City Council
(360) 491-3214

City Manager
(360) 491-3214

City Attorney
(360) 491-1802

Community Development
(360) 491-5642

Finance
(360) 491-3212

Park & Recreation
(360) 491-0857

Police
(360) 459-4333

Public Work
(360) 491-5600

Fax #
(360) 438-2669





Shaping
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together

CITY OF **LACEY**

POST OFFICE BOX 3400
LACEY, WA 98509-3400

CITY COUNCIL

- VIRGIL S. CLARKSON
Mayor
- NANCY J. PETERSON
Deputy Mayor
- ANN BURGMAN
- JOHN DARBY
- MARY DEAN
- THOMAS L. NELSON
- GRAEME SACKRISON

CITY MANAGER
GREG J. CUOIO

- Information not in an official juvenile court file concerning a juvenile or a juvenile's family may be released to the public only when that information could not reasonably be expected to identify the juvenile or the juvenile's family -- RCW 13.50.050(5).

If you believe that the information furnished has been incorrectly redacted or is incomplete, you may file a written appeal with the Chief of Police within seven business days from the date of this letter. The appeal must include your name and address, a copy of the redacted document and a copy of this letter, together with a brief statement identifying the basis of the appeal. Please mail or deliver your appeal to the Lacey Police Department. Our mailing address is PO Box 3400, Lacey WA, 98509-3400. We are located at the Lacey City Hall, 420 College St. SE. Our email address is lacypolice@ci.lacey.wa.us.

Sincerely,

Emily Logsdon
Police Assistant II
Lacey Police Department



TDD Relay
1-800-833-6388

City Council
(360) 491-3214

City Manager
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City Attorney
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Park & Recreation
(360) 491-0857

Police
(360) 459-4333

Public Work
(360) 491-5600

Fax #
(360) 491-2220



Area Patrol Supplemental Disclosure <input type="checkbox"/> Y <input type="checkbox"/> N	Lacey Police Department Short Report	Case Number: 05-4033
--	---	-----------------------------

INCIDENT TYPE			
Theft 3	LMC 9.28.050	<input type="checkbox"/>	1653
Malicious Mischief	LMC 9.28.020	<input type="checkbox"/>	1702
Lost Property		<input type="checkbox"/>	5250
Hit/Run Private Property	RCW 46.52.010	<input type="checkbox"/>	4057
Informational Only / Other:		<input checked="" type="checkbox"/>	

Reported Date and Time				Occurred From Date and Time				Occurred To Date and Time			
Month	Day	Year	Time	Month	Day	Year	Time	Month	Day	Year	Time
07	15	2005	0031								

Address/Location of Incident	Premise Type or Name
	One Story house-01

SUBJECT INFORMATION

Codes: C-Complainant V-Victim B-Business W-Witness RO-Registered Owner D-Deceased G-Parent or Guardian											
Code	Name (Last, First NMI)	Race	Ethnic	Sex	DOB	Height	Weight	Hair	Eyes		
C-1											
Street Address				City		State	Zip Code	Home Phone		Work Phone	
Resident Status: <input checked="" type="checkbox"/> Full Time <input type="checkbox"/> Part Time <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown											

Codes: C-Complainant V-Victim B-Business W-Witness RO-Registered Owner D-Deceased G-Parent or Guardian											
Code	Name (Last, First NMI)	Race	Ethnic	Sex	DOB	Height	Weight	Hair	Eyes		
X-1											
Street Address				City		State	Zip Code	Home Phone		Work Phone	
Resident Status: <input type="checkbox"/> Full Time <input type="checkbox"/> Part Time <input checked="" type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown											

Codes: C-Complainant V-Victim B-Business W-Witness RO-Registered Owner D-Deceased G-Parent or Guardian											
Code	Name (Last, First NMI)	Race	Ethnic	Sex	DOB	Height	Weight	Hair	Eyes		
Street Address				City		State	Zip Code	Home Phone		Work Phone	
Resident Status: <input type="checkbox"/> Full Time <input type="checkbox"/> Part Time <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown											

BUSINESS NAME/INFORMATION						
Business Name	Address			City	State	Zip
Business Phone	Above listed subject is: <input type="checkbox"/> Manager <input type="checkbox"/> Employee <input type="checkbox"/> Owner					

VEHICLE INFORMATION

License #	State	Lic Type	Year	Make	Model	Color	Style	Vehicle Identification #			
Registered Owner Information (Last, First NMI)				Race	Ethnic	Sex	DOB	Height	Weight	Hair	Eyes
Street Address				City		State	Zip Code	Home Phone		Work Phone	
Description of Damage:									Cost of Damage Estimate:		
									\$		

Officer's Name	Badge #	Supervisor	Assigned to	Date of Assignment	Disposition
Aalbers	408				5



NARRATIVE / ADDITIONAL INFORMATION

On July 15, 2005 at approximately 0031 hours, I was dispatched to a suspicious circumstance phone detail. I called (C-1) reference this incident. She stated that came over to her house on July 14, 2005 at approximately 0100 hours. She stated that was drunk and told her he wanted to talk to her. He entered the house and started to laugh. She asked him what was so funny and he stated that he was going to jail. He told her that they are going to charge him with the molestation of his child. started to blame his ex-wife's new boyfriend for the molestation as well as the boyfriend's brothers. Thee ex-boyfriend was apparently charged with the molestation and ; told that he got in trouble for harassing him when he came out of court one day.

He told her that he was going to get all of his weapons tomorrow and he was going to start killing people. He offered to kill 's mother or anyone who had wronged her in her childhood. He also told her that he would kill her husband that she was separated from. He became slightly agitated when she told him that she did not want anyone to die. He asked her why she did not want revenge.

He then started talking about a large child porn ring. He stated that he had a list of people that he was going to kill. She wrote down the list at the time he was telling her it. The names were ('s estranged husband), who was circled in his year book from a high school in Utah. He told her that was the head of the child porn ring. who works for CPS. and who apparently were the names of his ex-wife's new boyfriend and his brothers.

stated that she had called ex-wife and told her this information. She apparently called 911 and reported it to Olympia PD at 2122 hours. The Olympia Officer apparently found that he 's lived in the county she they referred the case to the Thurston County Sheriffs Office. Deputy Esslinger started working the call at 2257 hours. Deputy Esslinger went 's residence and interviewed him. denied having any weapons or making any threats.

did not know if was serious or not and just wanted to report the incident just in case he was.

CASE STATUS: INFORMATION ONLY

I certify or declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. This form was completed and signed in Lacey, WA on the date listed above.

Reporting Officer's Signature: M. A. Personnel #: 408
LACEY POLICE DEPARTMENT - PO BOX 3400 - 420 COLLEGE ST SE - LACEY WA 98509-3400 PHONE: 360-459-4333 FAX: 360-456-7798

Detailed History for Police Call #051950775 As of 9/27/2007 10:16:04

Priority:3 Type:SUSPC - SUSP CIRC

Location:

.LA < 4400/ 4400>

LocCross:btwn

Created:	07/14/2005 23:31:19	P01	OLSOND
Entered:	07/14/2005 23:31:19	P01	OLSOND
Dispatch:	07/15/2005 00:31:13	P11	DITRICK
Enroute:	07/15/2005 00:31:13	P11	DITRICK
Closed:	07/15/2005 01:31:47	P11	DITRICK

PrimeUnit:3E39 Dispo:C Type:SUSPC - SUSP CIRC

Name: Phone:360/ Contact?:P RAddr:913 LILLY RD NE #A5,OL

Contact?:Phone

Agency:LP Group:LPD(OPD) Beat:LP-E(OP) Grid:3-B11(2-11C)

Case #:LP050004033 Detail

23:31:19 -CREATE Location: Type:SUSPP Name: RAddr:
 Phone:360/ Source:RESD Group:OPD Area:2-11C TypeDesc:SUSP
 Priority:3P Response:1PAT

PERSON LocCross:
 Agency:OP Map:J17 LocType:S Contact?:Phone

23:31:19 -ALI E911Pzne:360/ E911Pilot:P#360 E911Add:!
 E911Subs: E911Srce:RESD

23:31:19 -ENTRY TypeDesc:SUSP PERSON-->CLEAR Urgency:None-->R Comment:RP ADV SOON TO BE EXHUSBAND
 SAID HE ACQUIRED SOME GUNS AND WAS PLANNING TO KILL SOME PEOPLE. SUSP IS
 BELIEVES HE IS AT HIS PARENTS HOUSE

23:31:19 -COPY Location: --> Type:SUSPP-->WELFAR
 Group:OPD-->TCSO Area:2-11C-->K21 TypeDesc:WELFARE CHECK LocCross:btwn
 Priority:3P-->4P

Agency:OP-->TC Comment:NOT IN LACEY'S JURISDICTION, IN TCSO'S SEE CALL # .693

23:31:19 COPY Location: --> / Type:WELFAR-->SUSPC
 Name: Phone: --> Contact?:P
 Group:TCSO-->LPD Area:K21-->3-B11 TypeDesc:WELFARE CHECK-->SUSP CIRC LocDesc:None--
 > < 4400/ 4400> Priority:4P-->3 Response:1PAT-->2PAT Agency:TC-->LP Comment:THREATS
 WERE ACTUALLY MADE IN LACEY'S JURIS AT A HOUSE IN ARE OF AD... IS
 FEMALE WHO'S HOUSE THE THREATS WERE MADE AT...COUNTY DID WELFAR CHECK ON THE MALE
 AND DENIED EVERYTHING

23:31:19 -XREF Service:P Call:#051950749 Type:WELFAR Agency:TC

23:31:20 -PREMIS Comment:FPR, PPR

23:31:51 SELECT

23:34:20 XREF Service:P Call:#051950717 Type:THREA Agency:LP

23:37:48 MISC Comment:3E22 ADV PENDING

23:37:51 HOLD

23:44:03 SELECT

[07/15/2005]

00:31:13 DISPER 3E39 Operator:AALBERSM OperName:AALBERS, MIKE 3P39

00:31:13 -PRIU 3E39

00:37:26 PRMPT 3E39 Comment:Preempted and dispatched to call #051960007

00:37:26 -HOLD 3E39

00:37:35 DISPER 3E39 Location:PHONE Operator:AALBERSM OperName:AALBERS, MIKE 3P39
00:37:35 -PRIU 3E39
01:30:41 CASE 3E39 Case#:LP050004033
01:31:47 CLEAR 3E39 Dispo:C
01:31:47 -CLEAR
01:31:47 CLOSE

ORIGINAL

Attachment

1

FILED
COURT OF APPEALS
DIVISION II
10 JAN 21 PM 2:17
STATE OF WASHINGTON
BY _____
DEPUTY

Probable Cause
Certificate.

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

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DETT J. S. CLERK

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**SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

No. 05-1-01484-2

vs.

**DECLARATION OF PROSECUTOR
SUPPORTING PROBABLE CAUSE**

RAFAEL RIVERA,

Defendant

PHILIP HARJU, Deputy Prosecuting Attorney for Thurston County, declares the following in support of probable cause for charges in the above-entitled cause:

I am a Deputy Prosecuting Attorney for Thurston County, Washington. I believe that there is probable cause to believe that the above named defendant has committed the crime(s) of Child Molestation in the First Degree, based on the following information from the official investigative reports:

On August 8, 2005, ten-year-old M F M (DOB: 4-27-95) reported to Lacey detectives that on August 4, 2005, the suspect has sexually assaulted her while at her mother's residence at 4428 16th Ave SE in Lacey, WA. M F M stated that she was home alone with the suspect who was babysitting her and her brother, who had gone next door to swim. While she was on the couch watching TV, the suspect sat next to her and began touching her private area over her clothing, a skirt. M F M further stated that the suspect also rubbed her privates under her skirt but did not go inside her underpants. The suspect tried to put his hand under her underpants and she told him no. When M.F.M. moved to the other couch, the suspect followed her and continued to touch her "crotch." M F M stated that the suspect then began kissing her "crotch" over her clothing and the suspect told M F M that she was "hot." The suspect also took her leg to put it on his lap so that her leg was touching his privates, to which M F M told him to stop. M F M then went to her bedroom and shut the door and the suspect told her to come back to the living room and then he left the residence. M F M's mother, Millissa Marney provided Detective J Knight an address where the suspect was staying and the Thurston County Sheriff's deputies arrested the suspect without incident. After the arrest, the suspect told Detective Knight that he is currently homeless and has been going from home to home, unemployed and has been using methamphetamine and marijuana. The suspect admitted to babysitting M F M and her brother on August 4, 2005. The suspect stated he had no intention of harming M F M but admitted to rubbing her back, poking her belly, and "flicking" at a cat that was between her legs. When asked if M F.M 's leg was over his private area he said, "maybe" and stated that he would not

**DECLARATION OF PROSECUTOR
SUPPORTING PROBABLE CAUSE - 1**



EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lehigh Drive S.W.
Olympia, WA 98502
(360) 756-5540 FAX (360) 756-3358

SCANNED

Exhibit B

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have had the same contact with M F M if he had it to do over again and that he understands M.F M 's point of view The suspect stated that he used methamphetamine that morning and that could have affected his judgment When asked if there is any reason why M F.M. would lie, the suspect said, "In her version, I don't think she is necessarily lying I don't think the way she sees things, I think I, things weren't well I see how she would think that everything was just so way out of hand " The suspect also admitted to calling M F M "Hottie" and that she is very "girly" and that she is always pointing out the boys The suspect then expressed that he wished to talk to a counselor about his problems with kids and inappropriateness of his conduct with kids.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge.

Signed on August 9, 2005, in Olympia, Washington



PHILIP HARJU
Deputy Prosecuting Attorney
WSBA # 9527

**DECLARATION OF PROSECUTOR
SUPPORTING PROBABLE CAUSE - 2**



EDWARD G. HILTY
Thurston County Prosecuting Attorney
2000 Lakemidge Dr. S.W.
Olympia, WA 98502
(360) 784-5540 FAX (360) 833358

DECLARED

Attachment #2

Direct Examination
OK

Detective Knight

Michael Maninger

Mariah Maninger

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript and that the transcript is a true and complete record of my stenographic notes.

Dated this 14th day of August, 2006.



RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023

A P P E A R A N C E S

For the Plaintiff: Christy Peters
Deputy Prosecuting Attorney
2000 Lakeridge Drive SW
Olympia, WA 98502

For the Defendant: Samuel Meyer
Office of Assigned Counsel
1520 Irving Street
Tumwater, WA 98512

T A B L E O F C O N T E N T SEXAMINATION

<u>Plaintiff's witness</u>	<u>DX</u>	<u>CX</u>	<u>RDX</u>	<u>RCX</u>
Michael Maninger	59	67	71	*
Mariah Maninger	74	92	100	*
Det. Shannon Barnes	102	*	*	*
Det. Jeremy Knight	117	139	151	154

INSTRUCTIONS AND MOTIONS

<u>Type</u>	<u>Page</u>	<u>Ruling</u>
State's motions in limine	52-55	52-55

1 (Jury out.)

2 THE COURT: Good afternoon.

3 MS. PETERS: Good afternoon, your Honor.

4 MR. MEYER: Good afternoon, your Honor.

5 THE COURT: I understand that we have
6 something that we need to address before the jury
7 joins us..

8 MS. PETERS: Just briefly, your Honor.
9 Mr. Meyer had an opportunity to just talk to the --
10 one of the state's witnesses today. Based on that
11 Mr. Meyer and I had a short discussion about some of
12 the testimony, and I would like to make an oral
13 motion *in limine* regarding a couple issues that
14 Mr. Meyer and I have agreed to at the current time.
15 If something changes, we'll bring it back before the
16 Court.

17 The first issue is regarding another potential
18 victim of the defendant that occurred approximately
19 five or six years ago. Stephanie Maninger, who's now
20 20 years old and was 14 at the time, there was an
21 investigation by the Lacey Police Department
22 regarding an allegation of the defendant. The
23 circumstances surrounding that allegation of sexual
24 abuse are different from the facts before the Court,
25 and for that reason at this time I'm agreeing to not

1 make any mention of that offense on Stephanie. Of
2 course, if the defendant at a later time chooses to
3 take the stand and make any statements, potentially
4 that issue may need to be re-addressed.

5 THE COURT: Mr. Meyer.

6 MR. MEYER: I don't have any problem with
7 that, your Honor. We discussed that. I would have
8 moved to keep that out.

9 MS. PETERS: The next issue --

10 THE COURT: Just let me say, I'll grant that
11 motion *in limine* subject to the explanation that was
12 given. It wouldn't necessarily come in automatically
13 if he takes the stand, but if he testifies in a
14 certain way it then could be used for impeachment
15 purposes, but I'll grant the motion, yes.

16 MS. PETERS: The next matter, your Honor, is
17 regarding other touching that Mariah Maninger
18 disclosed regarding being touched on her chest by a
19 classmate at school, peer-age classmate at school,
20 and by a developmentally delayed neighbor in the
21 neighborhood. Both of these incidents were separate
22 and apart from the defendant's case. Both of these
23 incidents had actually different factual patterns
24 than the defendant's case and would not be relevant
25 for the case and I'm asking that that also not be

1 brought up.

2 THE COURT: Mr. Meyer.

3 MR. MEYER: No objection, your Honor.

4 THE COURT: All right. That motion is
5 granted.

6 MS. PETERS: The next --

7 THE COURT: Oh, there's another one.

8 MS. PETERS: Two more issues, your Honor.

9 The third regarding a no-contact order that Angela
10 Rivera has against the defendant that occurred prior
11 to this case taking place. Mariah Maninger knew
12 about that no-contact order and mentioned it during
13 her interview, and I have instructed her not to talk
14 about that no-contact order unless it comes up again
15 from either later evidence or the defendant taking
16 the stand and testifying in a certain way.

17 THE COURT: All right. Mr. Meyer.

18 MR. MEYER: No objection to that, your Honor.

19 THE COURT: All right. Granted.

20 MS. PETERS: The last issue, your Honor, is
21 regarding an arrest of Melissa Marney, who is the
22 mother of Mariah Maninger, and it occurred in the
23 same time period, but regard -- as the allegations --
24 within a few days of the allegations and disclosure
25 by Mariah to her father, Michael Maninger, but it's

1 not connected directly to the allegations of the
2 defendant sexually abusing Mariah. Melissa Marney is
3 not going to be a witness. She is not on either
4 witness list for the state or the defense, and at
5 this time I don't believe there would be any
6 probative value and it would be more prejudicial than
7 relevant for those facts to be brought up.

8 THE COURT: Mr. Meyer.

9 MR. MEYER: No objection, your Honor.

10 THE COURT: All right. Granted.

11 MS. PETERS: With that, your Honor, the state
12 is ready to proceed.

13 THE COURT: Mr. Meyer, do you have anything
14 further?

15 MR. MEYER: Nothing further, your Honor.

16 THE COURT: All right. Let's have the jury
17 join us.

18 (Jury enters.)

19 THE COURT: All right. Ladies and gentlemen,
20 you'll recall this is the time I'd give you the
21 second oath so if you'd please raise your right
22 hands. Do you solemnly swear or affirm under law
23 that you will well and truly try this case brought by
24 the state against the defendant, Rafael Rivera, and
25 render a verdict according to the evidence and

1 instructions of the court, so help you God. If you
2 accept this, say I do. (Response)

3 Please be seated.

4 I apologize for the slight delay in starting.
5 There were some motions. We did start court on time
6 at 1:30, but we had to take care of some business
7 outside your presence. I imagine and I'm confident
8 that you recall the instructions I gave you last
9 evening before we recessed. There are just a couple
10 of additional instructions I wanted to remind you of.
11 One, in this case in which there's five separate
12 crimes alleged -- a separate crime is charged in each
13 count -- you must decide each count separately. Your
14 verdict on one count should not control your verdict
15 on any other count.

16 Also, a person commits the crime of child
17 molestation in the first degree when that person has
18 sexual contact with another person who is less than
19 twelve years old and who is not married to the
20 perpetrator and the perpetrator is at least 36 months
21 older than the victim.

22 And sexual contact means any touching of the
23 sexual or other intimate parts of a person done for
24 the purpose of gratifying the sexual desire of either
25 party.

1 So I thought those definitions would be useful for
2 you before you listen to the evidence.

3 The final thing I want to remind you about is
4 evidence can't or testimony can't be brought back to
5 you in the jury deliberation room. Even though
6 there's a court reporter taking everything down here,
7 if you send me a note, gee, Judge Hicks, we can't
8 agree on what that very first witness said. Could
9 you send us the transcript? I would have to send you
10 back a note and say no, that's not allowed. And
11 later when the case is all over with, we can discuss
12 why that is.

13 But we want you to get it. I mean, that's the
14 whole reason you're here. So if there's an answer
15 that isn't clear -- for instance, there will be some
16 children testifying. Maybe they'll mumble. Maybe
17 they'll speak in a low voice -- we'll try to use the
18 amplification -- or maybe an attorney will speak
19 quickly and you won't get the question. Just raise
20 your hand and let the bailiff or me know and I'll
21 have them do it over again so you get it. I can do
22 that in the courtroom in front of you. What I can't
23 do is send you a typed transcript of what was said.
24 So you need to pay attention and get everything the
25 first time or immediately raise your hand so that I

1 can have it repeated for you.

2 All right. And now you'll recall we're going to
3 start with the opening remarks of Ms. Peters and
4 perhaps Mr. Meyer.

5 Mr. Meyer, will you be making any opening
6 statements?

7 MR. MEYER: I will your Honor.

8 THE COURT: We'll have opening statements
9 from both counsel and then we'll hear the first
10 witness.

11 Ms. Peters.

12 *****

13 (Opening statements)

14 *****

15
16 THE COURT: Thank you, Mr. Meyer.

17 I'm going to invite the state to call their first
18 witness, but it occurs to me I should also give you a
19 heads-up that they're working on the elevator, and
20 from time to time you may hear banging, and unless it
21 gets too loud, I'm going to suggest we just work
22 through it, but if it gets to the point where you
23 can't hear testimony, let me know. We could look for
24 another courtroom as a possibility. But we're going
25 to hear that banging all the way up and down the

1 hallway just to let you know ahead of time.

2 Ms. Peters, you may call your first witness.

3 MS. PETERS: Thank you, your Honor. At this
4 point I will call Michael Maninger.

5 THE COURT: Mr. Maninger, please come
6 forward. Raise your right hand.

7

8 MICHAEL ANTHONY MANINGER, having first been duly sworn,
9 appeared and testified as follows:

10

11 D I R E C T E X A M I N A T I O N

12

13 BY MS. PETERS:

14 Q. Good afternoon, Mr. Maninger. Could you please state your
15 full name and spell your last name for the record.

16 A. Michael Anthony Maninger, M-a-n-i-n-g-e-r.

17 Q. And what city do you currently reside in?

18 A. Lacey, Washington.

19 Q. And who do you live with right now?

20 A. Just me and my children.

21 Q. And who are your children?

22 A. Mariah Maninger and Victor Maninger.

23 Q. And how old are Mariah and Victor?

24 A. Nine and ten.

25 Q. And is there some type of custody arrangement right now

1 regarding Mariah and Victor?

2 A. Joint custody.

3 Q. And who is that with?

4 A. Melissa Marney.

5 Q. And is that the -- your ex-wife, the mother of Mariah and
6 Victor?

7 A. Yes.

8 Q. If you had to give an approximate percentage,
9 approximately how much of the time are the children with
10 you?

11 A. 99 percent.

12 Q. I'm going to ask you -- take you back to last August,
13 2005. Did you make a call to law enforcement on August
14 4th, 2005?

15 A. Yes.

16 Q. And what was that call for?

17 A. For Mariah told me something that had happened so I called
18 the police.

19 Q. So it was something that you felt the police needed to get
20 involved with?

21 A. Yes.

22 Q. Can you maybe indicate what happened just prior to the
23 call, or actually strike that.

24 Was August 4th, 2005 a day that you worked if you
25 remember?

1 A. Yes. I worked that day.

2 Q. Okay. And how do you remember that you worked that day?

3 A. I went to work that day.

4 Q. And when you -- when you went to work, where did your
5 children go?

6 A. I dropped them off at their mother's house like I do
7 basically every morning.

8 Q. And where does their mother live?

9 A. Off College Street.

10 Q. In what city?

11 A. Lacey.

12 Q. And approximately what time did you usually return home
13 from work?

14 A. I usually pick them up -- depends where I'm working, but
15 about 4:30 on the average.

16 Q. That would be in the afternoon?

17 A. Yes.

18 Q. And when you picked the kids up, you bring them back to
19 your house?

20 A. Yes.

21 Q. Which is at another location in Lacey?

22 A. Yes.

23 Q. Okay. If you can recall, what happened after you picked
24 up the children that day, August 4th, 2005?

25 A. I took them home and life was normal; they played, what

1 have you. I was out front with a neighbor, and I told
2 Mariah -- she said she didn't want to go to her mom's --

3 MR. MEYER: I object, your Honor, if he
4 testifies to hearsay.

5 MS. PETERS: I'm not asking for the truth of
6 the matter asserted. I'm simply asking what he did
7 in response, your Honor.

8 THE COURT: All right. In that case what
9 we're going to hear next is not substantive evidence.
10 It's not being offered as to whether it's true or not
11 so it doesn't make any difference whether it's true
12 or not. It's being offered only to show why this
13 witness did what he next did, and you can consider it
14 for that purpose, but not its truth content by
15 itself.

16 All right. You may inquire. Overruled, with that
17 explanation.

18 BY MS. PETERS:

19 Q. So Mr. Maninger, you indicated that there was some
20 discussion, and what was that discussion about, you and
21 Mariah?

22 A. The kids were outside. I told them that -- she said she
23 didn't want to go to her mom's the next day.

24 Q. "She" being Mariah?

25 A. Mariah said she didn't want to go to her mother's in the

1 morning, and I basically told her I didn't have an option.
2 I couldn't afford daycare, and she -- I don't want to go.
3 I don't want to go. I reminded her again that I can't --
4 you know, she goes to her mom's, it's free, you know.
5 It's what she does every day. I don't want to. I don't
6 want to. She said, well, you can sell my dirt bike to pay
7 for daycare.

8 Q. Sell her dirt bike?

9 A. Yeah. She won't even let her brother sit on the dirt bike
10 so I was like, woe, what's the matter? And I kind of took
11 her inside and she told me she didn't want to go to her
12 mom's. She didn't want to go to her mom's. And then she
13 said that someone had touched her inappropriately.

14 MR. MEYER: Your Honor, I'll object at this
15 point.

16 THE COURT: I'll sustain that objection.

17 BY MS. PETERS:

18 Q. So she told you something concerning?

19 A. Yes.

20 Q. And based upon what she told you that was concerning, what
21 did you do next?

22 A. I told her that I wanted to call the police, and she
23 didn't want me to. And we talked for a little while, and
24 she kind of -- you know, I wanted to keep trust with your
25 kid, you know, so we talked about it and ended up calling

1 the police department.

2 Q. And who actually made the call to the police department?

3 A. Me.

4 Q. And do you remember what happened when you made that phone
5 call to the police department?

6 A. They sent out a police officer.

7 Q. And that -- I mean to your house?

8 A. Yes.

9 Q. And do you remember who the police officer talked to when
10 they arrived at your house?

11 A. Me.

12 Q. At that time did anyone talk to Mariah?

13 A. No.

14 Q. And what essentially did you say to the police officer?
15 Did you talk about the concerning situation with Mariah?

16 A. Yeah, and basically that and what I had just talked about
17 everything.

18 Q. What you have already said to the jury?

19 A. (Nodding).

20 THE COURT: Is that "yes"?

21 THE WITNESS: Yes.

22 BY MS. PETERS:

23 Q. What happened next?

24 A. Then it ended up going to a different police department I
25 believe.

1 Q. Do you remember what law enforcement agency you first
2 contacted?

3 A. I believe Thurston County. I'm not sure. It just -- I
4 called the police. I don't know if there was a certain
5 police to call.

6 Q. But at some point Lacey Police Department became involved;
7 is that correct?

8 A. Yes.

9 Q. And was an interview set up for Mariah?

10 A. Yeah. I had to have the neighbor lady take her because I
11 don't really like to miss work.

12 Q. Do you remember approximately was it when that interview
13 took place?

14 A. It was like within four days, like the beginning of the
15 next week. As soon as -- we went when they said to go.
16 Or she went when they said to go.

17 Q. Let me ask you about your knowledge of the defendant. Do
18 you know the defendant in this case?

19 A. We were never close friends. I know who he is.

20 Q. So you know who Rafael Rivera is?

21 A. Yes.

22 Q. Did you see him when you walked into the courtroom today?

23 A. Yes.

24 Q. And if you could for the record identify who he is by what
25 color shirt he's wearing.

1 A. Blue shirt.

2 MS. PETERS: Let the record reflect that the
3 defendant has been identified by this witness,
4 please.

5 BY MS. PETERS:

6 Q. You said that you know who he is. How do you know who he
7 is?

8 A. Friends of my ex-wife and my ex-wife's kind of like
9 sister's husband type deal.

10 Q. Okay. When you say kind of like sister's husband, who
11 would be the kind of like sister of your ex-wife?

12 A. Angela Rivera.

13 Q. So how long have you known him approximately, known the
14 defendant?

15 A. Eight to ten years maybe.

16 Q. Did you know that the defendant was going to be
17 baby-sitting your children on August 4th, 2005?

18 A. No.

19 Q. I have nothing further, thank you. Mr. Meyer may have
20 some questions for you.

21 THE COURT: Thank you, Ms. Peters.

22 Mr. Meyer, do you have questions for Mr. Maninger?

23 MR. MEYER: I do, your Honor.

24

25

C R O S S - E X A M I N A T I O N

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BY MR. MEYER:

Q. Back on August 4th of 2005 did you recall, you know, leaving work and going to your ex-wife's home to pick up your daughter?

A. Yes.

Q. Okay. And do you recall what time of the day that was?

A. Probably around 4:30.

Q. But you can't recall specifically or you just base that on your common experience and day-to-day work schedule?

A. Yeah. The average is 4:30.

Q. And then when you picked her up, you pick up your other child there as well?

A. Yes.

Q. And when you arrived at your ex-wife's residence, were both children there?

A. I believe Victor -- they were out somewhere, around outside playing, in the house.

Q. Do you recall what they were doing?

A. No.

Q. Okay. Were they doing anything out of the ordinary?

A. I don't recall any specifics on whether they were riding their bike, coloring, sorry. I don't recall.

Q. But they would -- if I understand your testimony they were

1 doing things that kids of that age normally do for that
2 time of day; is that right?

3 A. Probably, yes.

4 Q. And you described a couple of things like riding a bike or
5 coloring or something that they would normally do. Is
6 that correct?

7 A. Playing with the neighbor kids over there.

8 Q. When you came back to your ex-wife's home to pick them up
9 was your ex-wife there at the time?

10 A. Like I dropped them off in the morning, same when I came
11 back --

12 Q. When you came back in the evening to pick up your children
13 was your ex-wife at home?

14 A. I don't believe she was.

15 Q. Okay. Was anyone at home looking after the children?

16 A. Yes.

17 Q. Okay. And who was that?

18 A. Rafael.

19 Q. So you saw him.

20 A. Yes.

21 Q. Did you speak to him at all?

22 A. Maybe like a hi. I don't really talk to him very much,
23 no.

24 Q. You had said in response to Ms. Peters' questions that you
25 were unaware of whether or not Mr. Rivera would be looking

1 after the children on that particular day; is that
2 correct?

3 A. I dropped the kids off. Mom's supposed to be watching
4 them. I go to work.

5 Q. You come back.

6 A. I come back and pick them up.

7 Q. And Rafael Rivera was watching them.

8 A. Yes.

9 Q. And that at that point didn't cause you any concern; is
10 that correct?

11 A. It concerned me.

12 Q. But that -- he looked after the children before to your
13 knowledge?

14 A. No, or I would have put my foot down on that.

15 Q. And yet the next day you were planning on taking them back
16 to your ex-wife's home to be looked after; is that
17 correct?

18 A. Yes. Court order says I have to.

19 Q. Well, as I understand it earlier, that essentially you use
20 your ex-wife to provide daycare; is that correct?

21 A. Earlier?

22 Q. In your testimony.

23 A. Yes.

24 Q. That's what you were doing on that particular day when you
25 were working.

1 A. It says while I work I drop the kids off there. I dropped
2 the kids off there; I go to work.

3 Q. And that's part of your routine.

4 A. Yes.

5 Q. Okay. And then when you made the decision to call the
6 police, do you recall at what time that was?

7 A. No. It was between five and ten. I don't have a really
8 good photo memory on time.

9 Q. Do you remember how -- well, what did Mariah do when she
10 came back, back to your home? Did she go out and play
11 like she normally did?

12 A. She went to the neighbors and played, yes.

13 Q. Just what she would normally do for that time of day?

14 A. Probably, yes.

15 Q. And then we began the discussion as to what was going to
16 happen the next day is when she expressed some resistance
17 about going back to her mother's; is that correct?

18 A. Yes.

19 Q. And that was later in the evening?

20 A. That was getting later, yeah.

21 Q. Getting ready to go to bed or something like that?

22 A. You know, come in, homework, dishes, getting -- probably
23 seven or eight o'clock. I don't want to totally quote
24 that time, but it was getting towards the evening.

25 Q. Okay. Did you say "homework"?

1 A. Yes.

2 Q. Okay. Is this -- was she in school in August?

3 A. Well, homework, whatever they have to do, homework.

4 Q. Do you recall what day of the week this was?

5 A. Wednesday, Thursday.

6 Q. And then after the police were called, were you able to
7 make some alternate arrangements for her care the next
8 day?

9 A. I believe --

10 Q. Or do you recall?

11 A. Yep, the neighbors watched them. And then they watched
12 them on the following Monday. They took her to meet the
13 detective.

14 MR. MEYER: I don't have any other questions.
15 Thank you.

16 THE COURT: Thank you, Mr. Meyer.
17 Ms. Peters, anything further?

18 MS. PETERS: Just a moment.
19 Just one question, your Honor.

20

21 R E D I R E C T E X A M I N A T I O N

22

23 BY MS. PETERS:

24 Q. Mr. Maninger, after you contacted the police, did you talk
25 to anyone else about Mariah's comments to you, disclosure

1 to you?

2 A. The neighbors, and I called their mother.

3 Q. Was that the same day?

4 A. Yes.

5 Q. August 4th.

6 I have nothing further.

7 THE COURT: Thank you, Ms. Peters.

8 Mr. Meyer, anything?

9 MR. MEYER: Nothing further, your Honor.

10 THE COURT: You may step down. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: Does the state have another

13 witness?

14 MS. PETERS: Yes, your Honor. At this time
15 the state's going to call Mariah Maninger.

16 Your Honor, the state is not going to be recalling
17 Mr. Maninger. Would it be able for him to stay in
18 the courtroom?

19 THE COURT: I would ordinarily allow that.

20 Mr. Meyer.

21 MR. MEYER: Your Honor, I would ask that
22 given the nature of this case that he wait outside.
23 He might be subject to recall for rebuttal.

24 THE COURT: You know, in light of the age of
25 the next witness and the fact that Mr. Maninger has

1 completed his testimony -- I usually have witnesses
2 wait outside until after they've testified, but
3 that's happened here, and in light of the age of the
4 next witness I think it's appropriate for her to have
5 a support person here and Mr. Maninger may remain.

6 Hi.

7 THE WITNESS: Hi.

8 THE COURT: Please raise your right hand.

9

10 MARIAH MANINGER, having first been duly sworn,
11 appeared and testified as follows:

12

13 THE COURT: How old are you?

14 THE WITNESS: 10.

15 THE COURT: 10. And what grade in school are
16 you?

17 THE WITNESS: (Inaudible).

18 THE COURT: What?

19 THE WITNESS: (Inaudible).

20 THE COURT: Fifth grade. All right. So
21 remember to speak into the microphone so your voice
22 is loud enough.

23

24

25

D I R E C T E X A M I N A T I O N

1
2
3 BY MS. PETERS:

4 Q. Mariah, can you please state your full name so the jury
5 can hear your first name and last name.

6 A. Mariah Faith and Russell Maninger.

7 Q. You have two middle names?

8 A. (Nodding).

9 THE COURT: When you nod your head, I can
10 probably figure out what you mean, but the court
11 reporter sitting here can't see you so try to answer
12 with words and not just nodding your head one way or
13 the other.

14 BY MS. PETERS:

15 Q. Just look at me, okay? So Mariah, you already told Judge
16 Hicks that you're ten years old and you're in 5th grade,
17 right?

18 A. Yeah.

19 Q. Where do you go to school?

20 A. Mountain View Elementary.

21 Q. And what is your teacher's name?

22 A. Ms. Morey.

23 Q. And do you remember who your teacher was last year in
24 fourth grade?

25 A. (Inaudible).

1 Q. What was that?

2 A. Ms. Arabay.

3 Q. And outside of school what's your favorite thing to do?

4 A. Shop.

5 Q. And what's your favorite store?

6 A. American Eagle.

7 Q. And do you know the name of the chair that you're sitting
8 in right now?

9 A. Truth chair.

10 Q. Why is it called that?

11 A. Because you have to tell the truth in the chair.

12 Q. And Mariah, who do you live with right now?

13 A. My dad.

14 Q. And do you live with anybody else beside your dad?

15 A. Sort of, my mom.

16 Q. Are there any other brothers or sisters?

17 A. Yes.

18 Q. Are there any brothers or sisters?

19 A. Yeah.

20 Q. At your dad's house, do you have any brothers or sisters?

21 A. Yeah, brother.

22 Q. And what's his name?

23 A. Victor.

24 Q. And how old is Victor?

25 A. Nine.

1 Q. And Mariah, what is your birthday?

2 A. April 27th.

3 Q. So it's coming up. And you'll be eleven?

4 A. Yeah.

5 Q. And when you live with your dad, where do you live? What
6 city do you live in with your dad? Do you know what city
7 it is?

8 A. Lacey.

9 Q. Mariah, do you know a man named Rafael Rivera?

10 A. Yes.

11 Q. And how do you know him?

12 A. Through my aunt.

13 Q. And who is your aunt?

14 A. Angela.

15 Q. Do you know Angela's last name?

16 A. No.

17 Q. What's her last name?

18 A. Rivera.

19 Q. So how long have you known Rafael Rivera?

20 A. I don't know.

21 Q. As long as you can remember?

22 A. I guess, yeah.

23 Q. Did something ever happen to you with Rafael Rivera that
24 you didn't like?

25 A. Yes.

1 Q. And Mariah, what is your birthday?

2 A. April 27th.

3 Q. So it's coming up. And you'll be eleven?

4 A. Yeah.

5 Q. And when you live with your dad, where do you live? What
6 city do you live in with your dad? Do you know what city
7 it is?

8 A. Lacey.

9 Q. Mariah, do you know a man named Rafael Rivera?

10 A. Yes.

11 Q. And how do you know him?

12 A. Through my aunt.

13 Q. And who is your aunt?

14 A. Angela.

15 Q. Do you know Angela's last name?

16 A. No.

17 Q. What's her last name?

18 A. Rivera.

19 Q. So how long have you known Rafael Rivera?

20 A. I don't know.

21 Q. As long as you can remember?

22 A. I guess, yeah.

23 Q. Did something ever happen to you with Rafael Rivera that
24 you didn't like?

25 A. Yes.

1 Q. Can you tell the jury where you were when that happened.

2 A. I was on my couch.

3 Q. On your couch. Do you remember whose house were you at?

4 A. My mom's.

5 Q. And do you know what city your mom's house is in?

6 A. Lacey.

7 Q. And do you remember about when this happened? Was this --
8 did this happen in 2006, this year, since the winter?

9 A. No.

10 Q. No. When did it happen?

11 A. In 2005.

12 Q. And do you remember what part of year it was? Were you in
13 school?

14 A. No.

15 Q. So was it in summer?

16 A. Yeah.

17 Q. And you were at your mom's house?

18 A. Yeah.

19 Q. Is that usually what happened on summer days? Were you
20 usually at your mom's house?

21 A. Yeah.

22 Q. Were there any -- was there anybody else in the house
23 beside you that day?

24 A. No.

25 Q. Who else was in the house that day?

1 A. It was just me and him.

2 Q. And did it start out just you and Rafael that day?

3 A. No.

4 Q. Why don't you tell me who all was there at the beginning
5 the day.

6 A. My sister, Ruby, and my brother Victor and my little
7 brother River.

8 Q. I'm going to write this down because you said two names we
9 haven't talked about yet. You already talked about Victor
10 is your brother, that you live with your dad, right?

11 A. Yeah.

12 Q. Who is Ruby?

13 A. My older sister.

14 Q. And how old is Ruby?

15 A. 13.

16 Q. Is she the same mom -- does she have the same mom as you?

17 A. Yeah.

18 Q. Does she have the same dad as you?

19 A. No.

20 Q. What about River?

21 A. He has the same mom as me.

22 Q. And how old is he?

23 A. Six.

24 Q. Does he have the same dad as you?

25 A. No.

1 Q. Okay. So that day there's four kids including you? Ruby,
2 River, Victor and Mariah at the house; is that right?

3 A. Yeah.

4 Q. Okay. And you were still ten back in August, right?

5 A. Yeah.

6 Q. Okay. And were there any adults at the house?

7 A. Yes.

8 Q. Who were the adults that were at the house?

9 A. Just Rafael.

10 Q. Was your mom there?

11 A. No.

12 Q. Do you know where your mom was that day?

13 A. I think she was looking for a job.

14 Q. Okay. You said at some point you were the only kid at the
15 house; is that right?

16 A. Yeah.

17 Q. So where did the other kids go?

18 A. My sister went to the library with her cousin, and --

19 Q. So that's Ruby went to the library?

20 A. Yeah. And my brothers went swimming at the neighbor's
21 house.

22 Q. River and Victor did?

23 A. Yeah.

24 Q. And do you remember about how long you were there before
25 the kids left the house, the other kids left the house?

1 A. Like an hour.

2 Q. Were you dropped off in the morning do you remember?

3 A. Yeah.

4 Q. Was the defendant Rafael there right when you got there in
5 the morning?

6 A. No.

7 Q. When did he get there?

8 A. Like a couple of hours after I went there.

9 Q. So was there any adult there when you first got dropped
10 off?

11 A. My mom.

12 Q. So your mom was there at the beginning.

13 A. Yeah.

14 Q. And then she left?

15 A. Yeah.

16 Q. Okay. Did she leave when Rafael the defendant got there?

17 A. Yeah.

18 Q. So some time later in the morning the other kids have
19 left, Ruby to the library, the boys to swimming, right?

20 A. Yeah.

21 Q. And what were you doing in the house?

22 A. I was sitting on the couch watching TV.

23 Q. What room were you sitting on the couch in?

24 A. The living room.

25 Q. And where was the defendant?

1 A. On the couch in the living room.

2 Q. Were you guys on the same couch?

3 A. Not at first.

4 Q. Okay. Tell me about that.

5 A. Like I was on the bigger couch by the door and he was on
6 the other one.

7 Q. Do you remember what you were watching on TV?

8 A. No.

9 Q. And what happened next?

10 A. I went in my room and called my mom and said if I could go
11 swimming at the neighbor's house with my brothers.

12 Q. And what happened -- what happened?

13 A. My mom said I could go.

14 Q. Did you leave?

15 A. Yes.

16 Q. And did you go swimming?

17 A. Yeah.

18 Q. And did you come back?

19 A. Yes.

20 Q. And when you came back who was at the house?

21 A. Rafael.

22 Q. Were there any of the other kids back at the house yet?

23 A. No.

24 Q. Okay. After you went swimming and came back to the house,
25 what happened next?

1 A. He said he was going to go -- Rafael said he was going to
2 go up to the store.

3 Q. Okay. So did he leave you at the house alone?

4 A. Yes.

5 Q. Did he come back?

6 A. Yeah. After like an hour.

7 Q. After about an hour he came back?

8 A. Yes.

9 Q. Then what happened?

10 Well, actually let me ask you this. Strike that
11 last question. When he came back, was there anybody else
12 at the house besides you?

13 A. No.

14 Q. So he comes back and you're still the only one at the
15 house alone; is that right?

16 A. Uh-huh, yes.

17 Q. And when he came back what were you doing?

18 A. Sitting on the couch again.

19 Q. Were you on the big couch or the side couch?

20 A. The big couch.

21 Q. And what did the defendant do?

22 A. I don't remember.

23 Q. Okay. Did he come -- what did he do when he came into the
24 room? Did he go by you?

25 A. I think, yeah.

1 Q. Were you still laying down on the couch at this time?

2 Were you sitting -- lying down or sitting up?

3 A. Lying down.

4 Q. And do you remember what you were wearing?

5 A. Yes.

6 Q. What were you wearing?

7 A. Blue skirt.

8 Q. Okay. Do you remember what kind of shirt?

9 A. Yeah. I was wearing a white tank top.

10 Q. Do you remember if you had underpants on that day?

11 A. Yes.

12 Q. And did you?

13 A. Yes.

14 Q. Did you have on shoes or sandals?

15 A. No.

16 Q. Okay. So you're lying down on the couch, the big couch,

17 blue skirt, white tank top. You had underpants on,

18 nothing on your feet, no socks, no shoes. Okay. And you

19 said the defendant came by you. What do you mean by that?

20 Where did he come by you?

21 A. He just sat next to me.

22 Q. On the big couch?

23 A. Yeah.

24 Q. And when he sat next to you, what happened next?

25 Why don't you just tell me what the defendant did.

1 Is it hard to talk about?

2 A. (Nodding).

3 Q. Why don't you tell me -- did the defendant do something?

4 You've got to say yes or no.

5 A. Yes.

6 Q. So he did something. Did he use --

7 MR. MEYER: Your Honor, I'm going to object
8 if she's going to lead the witness at this point.

9 THE COURT: Overruled. I'm instructing the
10 prosecutor not to suggest answers, but I'll allow
11 some leeway because of the age of the witness in
12 bringing her attention to the questions that want to
13 be asked.

14 BY MS. PETERS:

15 Q. Okay. So Mariah, you said something happened. And why
16 don't you tell me. You said that you're laying down. Is
17 the couch big enough to lay down and still have someone
18 sit?

19 A. Yeah, because I was like sitting with him, like kind of
20 laying down at the same time.

21 Q. Kind of sitting and laying at the same time? So do you
22 remember were your knees up or down?

23 A. They were down.

24 Q. They were down.

25 A. Uh-huh.

1 Q. And where was the defendant -- you know, where was he in
2 relation to you on the couch?

3 A. At the end of the couch.

4 Q. Was he touching you in any way?

5 A. Yeah.

6 Q. With what part of his body was he touching you?

7 A. With (inaudible).

8 Q. You said he was kissing you? You have to say yes or no.

9 A. Yes.

10 Q. And where was he kissing you?

11 A. Between my legs.

12 Q. And was this on top of your skirt?

13 A. Yes.

14 Q. And do you remember how many times he kissed you on top of
15 your legs? Excuse me, between your legs on top of your
16 skirt?

17 A. No.

18 Q. Was it more than once?

19 A. Yes.

20 Q. And did he say anything while he was doing that?

21 A. No.

22 Q. And did he touch you with any other part of his body?

23 A. His hands.

24 Q. His hands. Okay. What did he do with his hand?

25 A. He like tried to go up my skirt.

1 Q. You know, I know there are some skirts that have kind of
2 -- they're called squorts --

3 A. This was a squort.

4 Q. Was this a squort? So just so -- make sure, why don't you
5 tell the jury what you consider a squort so we're talking
6 about the same thing.

7 A. Like a skirt with like a shorts under it.

8 Q. So is like the shorts part connected to the skirt part?

9 A. Yeah.

10 Q. That's what you were wearing that day.

11 A. Yeah.

12 Q. So you said the defendant's hands were -- he was trying to
13 go underneath that part?

14 A. Yes.

15 Q. Was he trying to go underneath the shorts part of the
16 squort?

17 A. Yes.

18 Q. And was he able to do that?

19 A. No.

20 Q. Okay. And why wasn't he able to do that?

21 A. Because I kept pushing my skirt down.

22 Q. And was he saying anything when he was doing this with his
23 hands?

24 A. No.

25 Q. And what happened next?

1 A. I got up, tried -- and I tried to call my mom.

2 Q. Okay. You say you got up and you tried to call your mom.
3 What happened?

4 A. He wouldn't let me.

5 Q. How -- what did the defendant do to not let you call your
6 mom?

7 A. He said I can't use the phone.

8 Q. So he said you couldn't use the phone. And so what did
9 you do next?

10 A. Then I took the phone to my room.

11 Q. Was it like a mobile phone?

12 A. No, it was a cordless phone.

13 Q. A cordless phone. So you took that to your room, and what
14 happened next?

15 A. He followed me.

16 Q. And why don't you tell me what happened next.

17 A. I kept telling him I was trying to call my friend, but he
18 wouldn't leave me.

19 Q. So he wouldn't leave where you were?

20 A. Yeah, but then he said that I needed to go back into the
21 living room, so I did. And then --

22 Q. So you went back into the living room, and where did you
23 go when you went back into the living room?

24 A. On the little couch.

25 Q. The little couch this time?

1 A. Yeah.

2 Q. Okay. And when you went on the little couch, how -- did
3 you sit or lay down or how did you go on the couch?

4 A. Sat.

5 Q. And you went on the little couch, sat down, what happened
6 next?

7 A. Then he sat on the big couch.

8 Q. Okay. And after that what happened?

9 A. Nothing.

10 Q. So did anything else happen that day that you didn't like?

11 A. Uh-uh, no.

12 Q. Did the defendant touch you anywhere that you didn't want
13 him to touch you?

14 MR. MEYER: At this point, your Honor, it's
15 been asked and answered. She indicated no.

16 THE COURT: Overruled. You can raise the
17 objection again if it becomes redundant here.

18 BY MS. PETERS:

19 Q. I just want to make sure that nothing else happened after
20 you went to the small couch, that there was nothing else
21 that happened as far as the defendant that you didn't
22 like.

23 A. (Indiscernible).

24 Q. Okay. You said "yeah"?

25 A. No.

1 Q. No. Okay. And did anybody else ever come home during
2 this time of the situation you just talked about?

3 A. No. I went back to swimming.

4 Q. So after that you went back to swimming. Were your
5 brothers still there at the swimming pool?

6 A. Yeah.

7 Q. And then were you ever alone with the defendant again the
8 rest of the day?

9 A. No.

10 Q. Okay. This is going to sound like a crazy question, but
11 are you married, Mariah?

12 A. No.

13 Q. And you're not married to the defendant.

14 A. No.

15 Q. I'm going to ask you just a little more questions about
16 one part of when you were on the big couch, okay? So I'm
17 going to take you back to the big couch, okay? And you
18 said that you were laying down, right?

19 A. Yes.

20 Q. And when you were laying down, do you remember if the
21 defendant put your feet anywhere?

22 MR. MEYER: Your Honor, object, leading.

23 THE COURT: Overruled. She may answer.

24 A. I think he pushed my feet off the couch.

25

1 BY MS. PETERS:

2 Q. So you think he pushed your feet off the couch?

3 A. Yeah.

4 Q. Did he ever put your feet anywhere you didn't want them to
5 be put?

6 A. Yeah.

7 Q. Yeah?

8 A. He put them on his legs. He put my legs between his legs.

9 Q. Put your legs between his legs?

10 A. Like on the side.

11 Q. On his lap?

12 A. Uh-huh, yes.

13 Q. Did he say anything to you when he did that?

14 A. No.

15 Q. And how did he do that? How was he able to put your feet
16 there?

17 A. Picked them up and put them there.

18 Q. Was that over his clothes?

19 A. Yes.

20 Q. Okay. Do you remember what he was wearing?

21 A. No.

22 Q. When you say he put his feet -- your feet between his legs
23 on his lap, what part of the body would you call that, for
24 him? You're shrugging your shoulders, but do you have a
25 name for that part of the body for a man? Is it hard to

1 say?

2 A. Yes.

3 Q. Remember, you're in the truth chair so you just have to
4 say it one time. What part of the body is it?

5 That's okay, Mariah.

6 Do you need a second? Want some Kleenex?

7 Do you remember what you call that part of the
8 body?

9 A. (Sniffling).

10 Q. Mariah, I'm almost done with my questions. I just want to
11 finish this last part, okay? Do you want me to repeat the
12 question? No? You remember what it was? Can you answer
13 it? You can't answer it right now? Okay.

14 MS. PETERS: That's all I have.

15 THE COURT: All right. You need to use the
16 Kleenex, that's in front of you. You're free to take
17 a Kleenex if you need.

18 All right. Now, we need to let Mr. Meyer ask any
19 questions he might have. Do you need a minute or are
20 you ready? You want to go through it and finish
21 right now rather than come back? Okay.

22 Mr. Meyer, do you have any questions?

23 MR. MEYER: Thank you, your Honor.

24

25

C R O S S - E X A M I N A T I O N

BY MR. MEYER:

Q. Not a very fun day for you, is it, Mariah?

THE COURT: Is that no?

You know, I'm going to give you a choice. I'm going to ask you to sit a little closer to the microphone or hold my microphone. Which would you rather do? Why don't you hold this microphone and let me make some adjustments here. Let's move that brown one away.

BY MR. MEYER:

Q. Mariah, do you remember speaking to a Lacey Police Detective, a woman by the name of Shannon Barnes?

A. Yes.

Q. Do you remember her giving a statement -- giving a statement to her, probably in a setting a little less intimidating than this?

A. Yes.

Q. Have you had a chance to review that statement lately? Have you looked over it at all?

A. What?

Q. Have you looked over that statement lately or recently?

A. No.

Q. Okay. Do you recall when the last time was you read it or

1 have you read it at all?

2 A. No.

3 Q. No, you can't recall or no you haven't read it?

4 A. No, I haven't read it.

5 Q. When you testified earlier about these things that
6 happened, and you also testified that -- for a period of
7 time Mr. Rivera left your mother's house; is that correct?

8 Okay. Do you recall whether or not these things
9 happened, you know, either before or after Mr. Rivera left
10 your house for a short period of time?

11 A. I don't remember.

12 Q. You don't remember whether or not these things happened
13 before or after Mr. Rivera left the house?

14 A. No.

15 Q. You didn't testify that Mr. Rivera left the house first
16 and then after he came back was when these things
17 happened? You're not remembering?

18 A. No.

19 Q. And it was your testimony that you were prevented from
20 using the telephone at some point; is that correct?

21 A. Yeah.

22 Q. Did you indicate that to Ms. Barnes when you spoke with
23 her back in August?

24 A. I don't remember.

25 Q. You don't remember?

1 mother on the telephone after all this had happened; is
2 that correct?

3 A. What?

4 Q. At some point on this particular day in August, you were
5 speaking with your mother on the telephone after all this
6 had happened with Mr. Rivera.

7 A. It was before.

8 Q. Well, and I'm not going to spend a lot of time on this, I
9 promise, Ms. Maninger, but back on August, you know, based
10 on your statement there to Ms. Barnes it would seem to
11 indicate that at some point you spoke on the telephone
12 with your mother after all this had happened. Is that
13 right or no?

14 A. No.

15 Q. I'm sorry?

16 A. I don't know.

17 Q. Do you recall what time your father came to pick you up
18 from --

19 A. No.

20 Q. -- from your mother's house on that day?

21 A. No.

22 Q. Okay. Do you recall how long after all this happened were
23 you at your mother's house before your father came to pick
24 you up? A couple hours or do you know?

25 A. I don't know.

1 Q. Was it almost right away after or were you there for a
2 while and continued playing with your siblings for a
3 while?

4 A. It was a while.

5 Q. What did you do after this? Did you go swimming after
6 this?

7 A. No.

8 Q. Did you go outside and what did you do?

9 A. I stayed in the house.

10 Q. I'm sorry?

11 A. I stayed in my room.

12 Q. And then were you having any contact with any of your
13 brothers or sisters?

14 A. No.

15 Q. Do you recall where they were?

16 A. Yes.

17 Q. Where were they?

18 A. My brothers were still swimming.

19 Q. And when your dad came back to pick you up, were they
20 present at your mom's house or were they at the other
21 house?

22 A. They were at the other house, but my sister was home.

23 Q. Which sister?

24 A. My sister Ruby.

25 Q. And so when your dad came to pick you up, he picked up you

1 and your brother Victor; is that correct?

2 A. Yes.

3 Q. Okay. And you were at your mom's house but Victor was
4 someplace else? Is that right?

5 A. Yes.

6 Q. And Victor was down at the area of the swimming area; is
7 that correct?

8 A. Yes.

9 Q. When your dad came to pick you up, were you, you know,
10 inside the house?

11 A. Yes.

12 Q. Okay. Did he knock on the door and you come down or do
13 you remember?

14 A. Yes.

15 Q. Okay. And so was Mr. Rivera still inside when this
16 happened?

17 A. I don't remember.

18 Q. But your sister was inside the house.

19 A. Yeah.

20 Q. When you got home do you remember what you did? To your
21 dad's house.

22 A. Yeah.

23 Q. Okay. What did you do?

24 A. I told my dad.

25 Q. Did you tell him right away as soon as you got home?

1 A. No.

2 Q. Did you wait until later in the day?

3 A. I don't know.

4 Q. Do you recall how much time passed from the time you got
5 home to when you told your dad about all this?

6 A. No.

7 Q. Okay. You don't -- couple hours or very short or do you
8 remember?

9 A. No, I don't remember.

10 Q. Okay. How far away is the house with the swimming pool
11 from your mom's house?

12 A. A couple houses up.

13 Q. Okay. If you're standing in the yard of one house can you
14 yell to the other house?

15 A. If they were outside, yes.

16 Q. If they were outside you could hear. So very close.

17 A. Uh-huh.

18 Q. Have you swam at that house a lot?

19 A. Yeah.

20 Q. Was that a thing you would often do when you went over to
21 your mom's house?

22 A. During the summer, yeah.

23 Q. And do you remember whether or not you told, you know,
24 Ms. Barnes that Mr. Rivera wouldn't let you use the phone?
25 Do you remember that or not?

1 A. No.

2 MS. PETERS: Objection, asked and answered.

3 THE COURT: Overruled. Her answer can stand.

4 MR. MEYER: No further questions, your Honor.

5 THE COURT: Thank you, Mr. Meyer.

6 Ms. Peters, do you have any further questions for
7 Mariah?

8 MS. PETERS: Just briefly, your Honor.

9

10 R E D I R E C T E X A M I N A T I O N

11

12 BY MS. PETERS:

13 Q. Mariah, Mr. Meyer asked you who you told first and you
14 said your dad. Is that correct?

15 A. Yes.

16 Q. Do you remember if you told anyone else about this right
17 after it happened?

18 A. I told my dad.

19 Q. Just your dad?

20 A. Yeah.

21 Q. Have you ever talked to any kid about this?

22 A. No.

23 Q. Both Mr. Meyer and I have been asking about the defendant
24 in this case, Rafael Rivera. Do you see him today in
25 court?

1 A. Yes.

2 Q. And what color shirt is he wearing?

3 Can you take a guess.

4 Do you see him in court? Where is he sitting?

5 A. By the window.

6 Q. Sitting by the window.

7 MS. PETERS: For the record, she's identified
8 the defendant. She looked over directly at the
9 defendant.

10 I have nothing further.

11 THE COURT: Anything further, Mr. Meyer?

12 MR. MEYER: No, your Honor.

13 THE COURT: All right. Thank you for handing
14 that back to me, and you may step down.

15 And since it's three o'clock, we'll take our
16 normal 15-minute recess. Although the jury joined us
17 about 15 minutes late, the court reporter, the clerk
18 and everyone else started on time. Please remember
19 not to discuss the case even though you've begun to
20 hear the testimony, and please stand.

21 Counsel have anything before we recess?

22 This will be about 15 minutes. Try to be ready at
23 3:15.

24 (A recess was taken.)

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(Jury enters.)

THE COURT: Please be seated.

Ms. Peters, do you have another witness?

MS. PETERS: I do, your Honor. The next witness for the state is Detective Shannon Barnes.

THE COURT: Detective Barnes, please come forward. Raise your right hand.

DET. SHANNON BARNES, having first been duly sworn,
appeared and testified as follows:

D I R E C T E X A M I N A T I O N

BY MS. PETERS:

Q. Detective Barnes, can you please state your full name and spell your last name for the record.

A. My name is Shannon Barnes, B-a-r-n-e-s.

Q. And --

THE COURT: I had that turned down for --
excuse me. Try it now.

THE WITNESS: B-a-r-n-e-s.

BY MS. PETERS:

Q. What is your current occupation?

A. I'm a detective for the City of Lacey.

Q. And how long have you been working with the City of Lacey?

1 A. Over eleven years now.

2 Q. And could you please give a background to the jury
3 regarding what type of training and experience you have
4 for your current position.

5 A. I have a bachelor of arts degree in law and justice. I
6 attended the basic law enforcement academy in Seattle and
7 I worked seven years on patrol. I'm a field training
8 officer. I've had classes in interrogating and
9 interviewing, basic crime scene, homicide, child sexual
10 assault and had the Harborview child interviewing and
11 investigation class and I attended the national crimes
12 against children conference in Dallas, Texas.

13 Q. The last two items that you indicated regarding the
14 Harborview child interview training and the conference,
15 were those specifically related to child abuse crimes?

16 A. Yes.

17 Q. Did you have occasion in your current position as a
18 detective with the Lacey Police Department to conduct a
19 forensic or an interview of a child in a case known as
20 State v. Rivera?

21 A. Yes, I did.

22 Q. And who did you interview in that case?

23 A. I interviewed Mariah.

24 Q. Do you remember approximately when you interviewed Mariah?

25 A. It was August 8th of 2005.

1 Q. And would that be Mariah Maninger?

2 A. Yes, I was referring, yes.

3 Q. And if you could just indicate to the jury what you were
4 referring to.

5 A. My police report.

6 Q. Did you write your police report close in time to this
7 interview?

8 A. The same day.

9 Q. Okay. Now, the jury has already heard Mariah testify
10 today. If you could please explain to the jury the
11 process of how you conducted that interview with Mariah
12 and then also explain what occurred, without eliciting
13 facts, but essentially what you observed during that
14 interview.

15 A. Okay. Well, I talk to a lot of children that report
16 crimes, and so we do what is referred to as a forensic
17 interview. And what that is is essentially is I talk to
18 the child about whether or not they understand the
19 difference between telling the truth and telling a lie and
20 whether they comprehend that it's very important to tell
21 the truth and there are consequences to telling a lie and
22 telling a lie is wrong. Once the child is able to
23 comprehend that, then I go through a series of what -- we
24 call them the rules of talking, and basically it's tell me
25 if you don't understand something. Tell me if you don't

1 know something. Tell me if you don't remember. It's not
2 essentially in that order. And then we go into some basic
3 questions, and one of the most frequent questions I use
4 with a child is do you know why you're here today? And
5 that seems to open the child up to provide me with a
6 narrative response of why they think they're with me on
7 that day.

8 THE COURT: Detective Barnes, could you speak
9 just a little slower.

10 THE WITNESS: I'm sorry.

11 BY MS. PETERS:

12 Q. Detective Barnes, let me ask you specifically about the
13 interview you conducted with Mariah in this case. You
14 indicated that you have kind of a preamble of early
15 questions that you ask regarding whether or not the child
16 even understands the interview structure or the rules of
17 the interview. After you presented that information and
18 questions to Mariah were you confident that she understood
19 the --

20 MR. MEYER: Your Honor, I'm -- I'll let the
21 question be asked. Then I may have a objection at
22 the end of it, but I wanted to caution the Court and
23 counsel before the answer appears.

24 THE COURT: I'll let the question be
25 completed, if it isn't, and that you hesitate so I

1 can rule before the answer.

2 BY MS. PETERS:

3 Q. To complete my question, did you have any concerns about
4 the interview with Mariah?

5 MR. MEYER: Your Honor, I do have an
6 objection here at this point. I think that an answer
7 there could be getting into this witness commenting
8 on the credibility of a certain statement given at a
9 certain time, and I also think it kind of goes to
10 hearsay as well, but I think most importantly it
11 comments on, you know, this witness's ability to
12 evaluate what was told to her back in August. I
13 don't think that's appropriate.

14 THE COURT: Ms. Peters, I'd be inclined to
15 sustain this objection unless you want argument
16 outside the presence of the jury.

17 MS. PETERS: Well, I have a different reason
18 for asking than what defense counsel I think is
19 concerned about. I'm asking simply about procedure,
20 not about the substance of the interview, whether or
21 not Detective Barnes had any concerns about whether
22 or not Mariah understood the procedure she was going
23 to be taking before she even gets to any substance.
24 That's why I asked the question at that time.

25 MR. MEYER: Your Honor, again --

1 THE COURT: Both attorneys have valid points
2 so I'm going to ask you to leave so I can flesh this
3 out outside your presence where we can go here. So
4 please stand.

5 (Jury exits.)

6 THE COURT: Now, of course in Washington one
7 witness cannot be asked about the credibility of
8 another witness, and that question was capable of
9 being answered in a way that would cross that line.
10 You indicate there is other reasons why you may be
11 putting that to Detective Barnes.

12 MS. PETERS: Yes.

13 THE COURT: So in the form of an offer of
14 proof, let's have the question and see how it's
15 answered and then see if Mr. Meyer still has an
16 objection.

17 MS. PETERS: And I may not word it exactly
18 the same way because I don't have it written down
19 verbatim, but essentially what I want to offer a
20 proof to ask Detective Barnes is whether or not in
21 the preamble in the introductory remarks she felt
22 that she had any -- whether or not she had any
23 concerns about whether Mariah even understood what
24 she was going to be asking as far as what type of
25 question she might be asking. And the reason for

1 that, your Honor, is that we have a ten-year-old
2 child, and my guess is that Detective Barnes would
3 say there's a big difference between younger
4 children, four, five, six years old and whether or
5 not they understand what they're going to be asked in
6 the interview process with a detective than perhaps a
7 nine- ten- or eleven-year-old child. That's the
8 basis of my question, and I don't know how Detective
9 Barnes would respond necessarily, but that would be
10 my guess is how she would respond.

11 THE COURT: So what's the question again,
12 please?

13 MS. PETERS: Basically when she gave the
14 preamble regarding the questions of whether or not
15 she even understood that she needed to tell the
16 truth, what is the truth, that type of thing, that
17 this was going to be a serious nature of questions
18 that she was going to be talking to, whether or not
19 she even had a relationship with the child as far as
20 the nature of this investigation. I'm not asking her
21 to comment on the evidence. I'm not asking her to
22 say anything about whether or not she believed
23 Mariah. I'm not asking her to say whether or not --
24 you know, anything regarding comment on the evidence
25 or her feelings about that. I'm simply asking her

1 just in the, you know, the beginning stage whether or
2 not she even understood what was going to happen in
3 the interview.

4 THE COURT: I'll listen to Mr. Meyer, but I
5 don't want to comment on your question, but it was
6 very compound. There were several questions there.

7 MS. PETERS: I understand that, your Honor.

8 THE COURT: So let me invite you again to ask
9 one question and let me hear what the proposed
10 answer's going to be, and maybe it will be okay. You
11 gave me so many different questions I can't rule on
12 them as a group. I need to have one question.

13 MS. PETERS: Well, certainly. And I'll even
14 give the preamble to Ms. Barnes, or Detective Barnes
15 saying -- not asking you to comment whatsoever on any
16 of the evidence or any of the statements made by
17 Mariah, only -- directed only at the preamble remarks
18 regarding understanding, what you were there to do
19 today to take a statement from her. Did she
20 understand that?

21 THE COURT: The answer is?

22 THE WITNESS: She appeared to understand
23 everything I was saying.

24 MS. PETERS: That would be my offer.

25 MR. MEYER: Well, your Honor, and I think

1 that that -- you know, whether or not Detective
2 Barnes had any concerns or not might be appropriate
3 for a child hearsay hearing if this child was of the
4 appropriate age to hear that. But this witness has
5 testified. The jury has assessed her ability to
6 speak and testify about the events that are alleged
7 to have occurred back in August of 2005.

8 And I would assert, no matter how Detective Barnes
9 answers that question, is in fact a comment on what
10 Ms. Maninger said back in August. If she says, yeah,
11 I had a lot of concerns about that, I mean basically
12 what she's saying is or implying is, well, she really
13 didn't understand that. Well, that's not appropriate
14 for a witness to comment on that, but if she did say
15 no, I had no concerns about that, that's the flip
16 side, yes, Ms. Maninger knew. She was commenting on
17 Ms. Maninger's understanding of what was going on
18 back then, and I just don't think that's appropriate.

19 Again, I think that's appropriate for a child
20 hearsay hearing which are routinely and are always
21 held outside the presence of the jury, but that's not
22 what we're here for. This witness has testified and
23 I would assert what Ms. Peters is seeking to do is to
24 bolster that testimony by saying -- having Ms. Barnes
25 indicate that, well, you know, I didn't have any

1 concerns about what she was saying about her
2 understanding of what we were doing back in August
3 2005. Again, in a case like this I don't think
4 that's appropriate.

5 THE COURT: What I am guided by here is
6 Evidence Rule 608, and particularly comment four
7 which is black lettered, "Opinion on Credibility
8 Barred." And the comment by Professor Tegland is,
9 quote, "Washington did not adopt the provision in the
10 federal rule that allows a witness to express an
11 opinion on the credibility of another witness. The
12 Washington courts have made it clear that the
13 credibility of a witness is for the trier of fact
14 alone to decide and opinions on credibility -- direct
15 or indirect -- are inadmissible."

16 "Division II" -- I'm skipping the four cases that
17 are cited -- "Division II has stretched the rule to
18 mean that Witness B may not testify that he
19 disbelieved Witness A at the time Witness A made a
20 particular statement *outside the courtroom.*" The
21 last phrase italicized.

22 And in *State v. Jerrels* this was raised to be a
23 constitutional issue, which means that it could even
24 be raised at appeal no matter what this court did.

25 MS. PETERS: Well, your Honor, I'm not asking

1 about her opinion on any of the testimony whatsoever.
2 I'm -- in fact as I indicated in my offer of proof, I
3 would even be happy to do a precursor as far as the
4 question to indicate that I am specifically not
5 asking her her opinion on the testimony. I'm simply
6 asking her whether or not the child understood her
7 preamble regarding the questions and the scenario
8 prior to getting into the facts of the case.

9 THE COURT: That gets us back to Mr. Meyer's
10 point, if you're testing the capacity of the witness
11 to be a legitimate witness with capacity to give
12 testimony, under *State v. Allen* for instance or
13 similar cases, that would be a separate determination
14 for this court to be made after the witness was
15 questioned in a way in which I could make that
16 determination. It isn't a determination -- although
17 it might be privately made by Detective Barnes to
18 determine whether or not she wants to go further in
19 an interview. It isn't a determination that she
20 makes in front of the jury.

21 MS. PETERS: Well, I think that I can go
22 around -- I can get around this point by indicating
23 that -- asking Detective Barnes if she continued in
24 her investigation after giving the preamble, and I
25 think then the rest can be left for argument, but she

1 would not have continued had she had any concerns.

2 THE COURT: When you say the "preamble," you
3 know, I know what I think you're referring to, which
4 is that part of a statement that begins with
5 identifying the time, the date, in cases of
6 defendants that they've been advised of their rights
7 and so on. Is that what you're referring to by the
8 preamble?

9 MS. PETERS: Yes, but specifically in this
10 case Detective Barnes indicated there were some
11 specific questions because it was a child she was
12 interviewing. That's why I asked specifically about
13 her special training in interviewing children.
14 Because there are some questions I believe Detective
15 Barnes asks only in child cases that she does not ask
16 if she were interviewing an 18-year-old for instance,
17 for an interview of the same type -- even if there
18 was the same type of facts she wanted to find out.

19 THE COURT: So I'm going back to you have to
20 ask a specific question and then I need to hear the
21 answer and then Mr. Meyer's specific objection, with
22 the caution that although we're outside the presence
23 of the jury, that I'm going to follow Professor
24 Tegland's commentary on Evidence Rule 608 and not
25 allow any testimony on credibility, direct or

1 indirect, because I would like not to have to try
2 this case twice.

3 MS. PETERS: And I understand where the
4 Court's going so I'm -- at this point I'm going to
5 withdraw the question. I think I can get the same
6 information out as I indicated through a different
7 line that I won't have to answer that question. I
8 can use it during argument.

9 MR. MEYER: I think that -- perhaps we can
10 address that now because if Ms. Peters indicates she
11 can get that same information out, I'm probably going
12 to raise -- if the question's phrased a little
13 differently but the destination of the target's the
14 same, I'm probably going to have an objection to that
15 also.

16 MS. PETERS: I'm not going to be asking that
17 question.

18 MR. MEYER: Okay. Well, if that's the case,
19 if something happens again, I can object and when I
20 feel appropriate.

21 THE COURT: Of course.

22 All right. Let's have the jury join us.

23 MR. MEYER: I would just say it would be my
24 position that the question, "Did you continue the
25 preamble," is also objectionable for the same

1 reasons, and again I could state that now --

2 THE COURT: We're going to start with a new
3 question when the jury comes back. She can be asked
4 about sense observations.

5 (Jury enters.)

6 THE COURT: Please be seated.

7 I'm a little concerned about the remark I just
8 made being capable of more than one interpretation,
9 and what I had in mind were perceptions, not some
10 type of intellectual weighing.

11 All right. I've sustained the objection, but you
12 may continue as the court's instructed.

13 MS. PETERS: Thank you, your Honor.

14 BY MS. PETERS:

15 Q. So Detective Barnes, you then proceeded into the interview
16 with Mariah; is that correct?

17 A. Yes.

18 Q. And why don't you explain to the jury what the setting was
19 for that interview. Where did this take place?

20 A. This interview took place at the Lacey Police Department
21 in the detective division, and we have a small interview
22 room where we interview witnesses and victims.

23 Q. And this was on August 8th, correct, of 2005?

24 A. Yes.

25 Q. And who was present in that interview?

1 A. Myself and Mariah.

2 Q. And through the interview process what did you observe of
3 -- what were any observations you made of Mariah?

4 A. Mariah would tear up on occasion while she was talking
5 with me.

6 Q. Did you notice anything regarding her body language?

7 A. I don't -- I don't recall specifically off the top of my
8 head.

9 Q. What did you do right after the interview was complete?

10 A. After I spoke with Mariah I went and informed the case
11 agent, who was Detective Knight, what Mariah told me.

12 Q. And I -- just wanted to clarify, when you were -- how did
13 you get this case or how did you become assigned to do
14 this interview?

15 A. Detective Knight is not trained in interviewing children,
16 and I am, and I do do most of the crimes against children
17 as my main duty. I don't recall why Detective Knight got
18 this case, but I did the interview for him and then he
19 continued on with the rest of the investigation.

20 Q. Okay. Thank you. I have nothing further.

21 THE COURT: Thank you, Ms. Peters.

22 Mr. Meyer.

23 MR. MEYER: No questions, your Honor.

24 THE COURT: No questions. Ms. Barnes, you
25 may step down.

1 The state's next witness.

2 MS. PETERS: The state's next witness is
3 Detective Jeremy Knight.

4 THE COURT: All right.

5 MS. PETERS: Your Honor, may this witness be
6 excused? Detective Barnes.

7 THE COURT: Yes, under local rule when she's
8 completed, she's free to go unless one of the
9 attorneys ask her to remain. Is she on your witness
10 list, Mr. Meyer?

11 MR. MEYER: No, your Honor, I have no
12 objection to that.

13 THE COURT: Yes, Detective Barnes is free to
14 go.

15 Detective Knight, would you please step forward.

16
17 DET. JEREMY A. KNIGHT, having first been duly sworn,
18 appeared and testified as follows:

19
20 D I R E C T E X A M I N A T I O N

21
22 BY MS. PETERS:

23 Q. Detective Knight, can you please state your full name for
24 the record.

25 A. Yes. It's Jeremy A. Knight, K-n-i-g-h-t.

1 Q. And what is your current occupation?

2 A. I'm a detective for the City of Lacey Police Department.

3 Q. And how long have you been employed with the Lacey Police
4 Department?

5 A. Seven years.

6 Q. Could you please briefly explain your training and
7 experience that you have for your current position.

8 A. I prior to being hired in '99 as a full-time law
9 enforcement officer was a reserve police officer for the
10 City of Lacey for roughly three years. I attended a
11 220-hour reserve law enforcement academy in Thurston
12 County. I was also a 911 dispatcher for both Thurston and
13 Pierce Counties. On being hired I attended a 440-hour
14 basic law enforcement academy where we learned all facets
15 of law enforcement and criminal investigations. Worked
16 four years in patrol, attending various training, and
17 officer survival tactics, et cetera. Once in detectives I
18 attended homicide investigation, interviewing and
19 interrogation, the investigation of officer-involved
20 fatalities, basic and advanced arson investigation and
21 various other training.

22 Q. And when, if you recall, did you first become aware of an
23 investigation involving Rafael Rivera?

24 A. On Friday August 5th of 2005.

25 Q. And if you could explain to the jury how you became aware

1 of that case.

2 A. I had been working day shift, came on duty in the morning,
3 and was contacted by one of our patrol lieutenants, a
4 supervisor, who advised me that the father of Mariah had
5 reported to the Thurston County Sheriff's Office that
6 there had been an incident, and it was determined that it
7 had taken place in the city of Lacey.

8 Q. And when you first found out about this case what did you
9 do?

10 A. I contacted the father by phone.

11 Q. And do you recall his name?

12 A. Michael Maninger I believe.

13 Q. And after you contacted Michael Maninger, what happened
14 next?

15 A. I spoke with him about our desire to interview his
16 daughter, Mariah, and he indicated that due to his having
17 a new job he was not able to take time off from work to
18 facilitate that himself, but we were welcome to interview
19 her Monday at the neighbor's house.

20 Q. And that would have been Monday August 8th of 2005?

21 A. Yes.

22 Q. And did you coordinate for that interview to take place?

23 A. I did.

24 Q. And how did you coordinate that?

25 A. I contacted a peer of mine, Detective Shannon Barnes, and

1 requested that she interview the daughter. I noted in the
2 report that she -- her father when he had called this in
3 had requested a female officer, as well as Detective
4 Barnes has attended training in -- specialized training in
5 interviewing children.

6 Q. And after the interview was conducted, what happened next?

7 A. After the interview was conducted by Detective Barnes she
8 and I spoke about the content of the interview, and I then
9 spoke with Mariah's mother on the phone, and she advised
10 me that she knew where Rafael Rivera was likely to be
11 found in Thurston County. I contacted the sheriff's
12 office and requested that they respond to that address and
13 attempt to locate Mr. Rivera, which they did. Took him
14 into custody and transported him to the Lacey Police
15 station.

16 Q. And so did this take place also on August 8th, 2005?

17 A. Yes, it did.

18 Q. And so now he was -- is in custody, the defendant, and
19 he's at the Lacey Police Department.

20 A. That's correct.

21 Q. What happened next?

22 A. At the police station I sat down with Mr. Rivera in an
23 interview room and introduced myself to him and advised
24 him why he was there and read him his Miranda rights.

25 Q. Okay. What are Miranda rights?

1 A. Miranda rights are the constitutional rights that are
2 afforded to persons who are being interviewed by law
3 enforcement in this type of situation.

4 Q. Okay. And you read these rights to the defendant.

5 A. I did.

6 Q. What happened next?

7 A. He acknowledged that he understood those rights and agreed
8 to speak with me about this matter.

9 Q. Okay. And let me ask you about that. At any time during
10 the interview of the defendant did he ever ask you to stop
11 asking questions?

12 A. No.

13 Q. At any time during the interview of the defendant did he
14 ever say, "I want an attorney"?

15 A. No, he did not.

16 Q. Were you able to determine the defendant's name and age?

17 A. I was.

18 Q. And what were they?

19 A. Rafael Rivera, and he was 38 at the time.

20 Q. And do you recognize Rafael Rivera somewhere in the
21 courtroom today?

22 A. Yes, I do.

23 Q. And could you please identify him for the record.

24 A. The gentleman in blue.

25 MS. PETERS: Let the record reflect that the

1 defendant has been identified by Detective Jeremy
2 Knight.

3 BY MS. PETERS:

4 Q. So why don't you explain to the jury what this setup was,
5 what the situation was for your interview with the
6 defendant, who was there. Where was it?

7 A. The defendant and I, we sat down in an interview room,
8 round table, and sat across from each other.

9 Q. No one else present in the room?

10 A. No.

11 Q. And was this interview being -- did you take notes or was
12 there a tape playing?

13 A. The course of the interview initially during obtaining
14 some cursory information, and reading Mr. Rivera his
15 rights and speaking with him initially about the matter,
16 was not taped. We then after obtaining, you know, this
17 information, a taped statement was obtained that was
18 recorded.

19 Q. So you were able to ask questions and the defendant was
20 able to answer and that was all on tape.

21 A. Correct.

22 Q. And after the tape was done, was it ever transcribed at
23 any point?

24 A. It was.

25 Q. And have you had an opportunity to review the

1 transcription?

2 A. I have.

3 Q. And is it accurate?

4 A. It is.

5 Q. And do you have a copy of that with you?

6 A. Yes.

7 Q. I'm going to ask you to refer to that probably for my next
8 sequence of questions.

9 A. Okay.

10 Q. And you indicated you had his name and his age, and did
11 you ask the defendant what he was doing on August 4th,
12 2005?

13 A. I did.

14 Q. And what did he say?

15 A. He said that he was baby-sitting for -- baby-sitting
16 Mariah Maninger and her brother.

17 Q. And did he indicate where he was baby-sitting these kids?

18 A. Yes. At Melissa Marney's residence on 16th Avenue in
19 Lacey.

20 Q. Did you ask the defendant anything about his current
21 living status?

22 A. I did. Mr. --

23 Q. What was that?

24 A. Mr. Rivera advised me that he was currently homeless,
25 going through a hard time, and as well was unemployed.

1 Q. And did he indicate to you how he knew Melissa Marney, how
2 did he come to baby-sit these children?

3 A. He advised me that he was the -- if I understand this
4 right, the ex-husband of Mariah Maninger's mother's
5 sister. The I guess aunt-in-law or uncle-in-law.

6 Q. Did he indicate to you who was Mariah's aunt?

7 A. His ex-wife, yes.

8 Q. Do you know her name?

9 A. I believe you just said it, Melissa --

10 Q. Melissa Marney was the parent of Mariah. Do you know who
11 Melissa's Marney's sister was?

12 A. I don't recall her name at this time, no.

13 Q. So it was some type of relation like aunt-in-law is how he
14 knew the children.

15 A. Yes.

16 Q. And when you started talking to the defendant did you
17 explain to him that you already had information from
18 Mariah regarding this case?

19 A. Yes.

20 Q. And how did you explain that to the defendant?

21 A. I advised Mr. Rivera that we had interviewed Mariah at
22 some length about her concern and allegation.

23 Q. And when you first stated that to the defendant what was
24 the defendant's response?

25 A. He was cooperative. He didn't have a whole lot to say

1 just to that.

2 Q. To that statement?

3 A. Correct.

4 Q. And did the defendant indicate to you at any point that he
5 understood where Mariah was coming from?

6 A. He did.

7 Q. Did he indicate to you what the circumstances were
8 regarding him and Mariah, whether or not they were alone
9 together?

10 A. He did. He described a situation on that Thursday, on the
11 fourth, where he was at the house in Lacey baby-sitting
12 Mariah and her younger brother, and that the younger
13 brother, Victor, was next door swimming at the time of
14 this incident.

15 Q. Did he indicate to you whether or not he knew Mariah's
16 age?

17 A. Yeah. I asked him if he knew how old Mariah was, and he
18 said that she was ten or eleven.

19 Q. And did he indicate to you what he and Mariah were doing
20 when they were alone together at the home?

21 A. He did. He stated that they were on the couch in the
22 living room watching television.

23 Q. Did you specifically ask him -- excuse me, strike that.
24 Did you specifically tell the defendant about Mariah's
25 allegation that the defendant was rubbing her vaginal

1 area?

2 A. Yes, I did.

3 Q. And what was the defendant's response to that?

4 A. You know, he had a lot of responses throughout that
5 contact. I want to be sure I refer to the correct one if
6 I may.

7 Q. Okay. I'm referring now to page five of your interview.
8 And towards the middle of that page you start asking him
9 specifically about some of the touching that Mariah had
10 disclosed; is that correct?

11 A. Correct.

12 Q. And regarding the question that you asked to the
13 defendant, what was the question that you asked?

14 A. I explained to him that she described this inappropriate
15 physical contact that you just described, and asked him as
16 he had explained to me earlier that he was trying to
17 define a line of being what was affectionate.

18 Q. And actually, Detective Knight, I'm going to ask you to
19 read that question so that the jury has the exact words
20 that you used and the exact words that the defense used.

21 A. The question was, "Okay. So on the couch Mariah is saying
22 that there was some inappropriate physical contact from
23 you involving your hands and rubbing her private area,
24 area of her vagina, on the outside of her clothing. Okay.
25 So we've talked about that and you were explaining to me

1 that you were trying to define a fine line of being, how
2 did you say it, affectionate?"

3 Q. And so when you said that, he never responded with no, did
4 he?

5 A. No, he did not.

6 Q. And then later on that page you asked him to describe the
7 contact that he did have with her, correct?

8 A. Yes.

9 Q. What was his response to that?

10 A. My question was, Describe the contact for me that you did
11 have with her.

12 And his answer was, "You know, armpit, armpit. On
13 her -- on her knee or something maybe, you know, just kind
14 of maybe that way, or actually I did rub her back later
15 that day because she was whining about going to McDonald's
16 so I did pat her on the back a couple of times. I poked
17 her belly, and you know from -- because I flicked the cat,
18 and she didn't like that, so she kind of hit me and I
19 poked her. But it was in a kidding way. It wasn't in
20 any..."

21 Q. So when you asked him specifically to describe the contact
22 he talked about having his armpit on her knee, correct?

23 A. Correct.

24 Q. And he also talked about backrubs.

25 A. Yes.

1 Q. And then a flicking on her stomach?

2 A. Correct.

3 Q. Okay. Later on in the interview you asked him whether or
4 not the victim, Mariah, had her feet on the defendant's
5 legs. And I'm referring to later on -- later on in the
6 discussion. I think it's on the bottom of six and going
7 to the top of page seven. Do you see where you asked the
8 defendant questions about that?

9 A. Yes.

10 Q. Why don't you indicate to the jury specifically your first
11 question that you asked on page seven.

12 A. "Was her leg touching over your private area?" was the
13 question.

14 Q. And does he say no to that?

15 A. No, he did not.

16 Q. What does he say?

17 A. His answer was, "I don't -- maybe, maybe. I'm not sure.
18 Because I mean, we were just sitting there, and I'm just
19 going to --"

20 Q. And farther down in that discussion you -- in the middle
21 of that page seven you specifically ask him regarding
22 Mariah's reporting about rubbing, rubbing the outside of
23 her skirt or underpants, correct?

24 A. Yes.

25 Q. And what was your question and what was his answer?

1 Strike that. What was your question?

2 A. I want to be sure --

3 Q. You start, "And putting aside..."

4 A. The question was, "And putting aside the appropriateness
5 and inappropriateness for just a moment, you know, but
6 getting real specific, she's reporting that you were
7 rubbing the outside of her -- of her skirt or underpants
8 in the area of her privates. That's what she's reported
9 to us."

10 Q. Did he say no to that question?

11 A. No.

12 Q. What did he say?

13 A. He said, "Okay. Well, I didn't -- I didn't think that
14 was" -- excuse me. "Well, I didn't -- I didn't think that
15 was no. I don't think so. As to say maybe."

16 Q. Going on --

17 A. My question --

18 Q. I'm sorry. I'm going on to another page of questions.
19 And you talked about that same discussion for a few more
20 questions, correct?

21 A. That's correct.

22 Q. That same topic.

23 JUROR: Could we have that last response
24 repeated, please?

25 THE COURT: Yes.

1 JUROR: Thank you.

2 THE COURT: Ms. Peters, do you know where you
3 were here?

4 MS. PETERS: I think it was -- you mean the
5 answer --

6 JUROR: The answer.

7 MS. PETERS: So I asked Detective Knight if
8 he said no to that, and you said no. And I said
9 well, what did he say to that? And Detective Knight
10 said -- I believe it's the answer beginning with
11 "Okay" on page seven.

12 A. Correct. "Okay. Well, I didn't -- I didn't think that
13 that was no. I don't think so. As to say maybe."

14 JUROR: Thank you.

15 BY MS. PETERS:

16 Q. So then you moved on, continuing on on that topic, and
17 then you changed topics slightly regarding whether or not
18 the defendant wanted help for his conduct?

19 MR. MEYER: Can I ask for a page number,
20 please.

21 MS. PETERS: Page eight towards the bottom.

22 BY MS. PETERS:

23 Q. And Detective Knight, do you see where I'm referring to?

24 A. I believe so.

25 Q. And do you recall having a conversation with the defendant

1 about whether he needed help for his conduct?

2 A. I do.

3 Q. And what did you ask?

4 A. I asked him -- said, "We've talked for a bit, Rafael,
5 about these issues and appropriateness or
6 inappropriateness of it, and you asked me a question
7 earlier along the lines of is there somebody that you can
8 talk to, somebody that we can put you in touch with, work
9 through some issues with, and perhaps help you understand
10 what is appropriate, where is the line, things like that.
11 Is that something you'd be interested in?"

12 Q. What did the defendant say to that?

13 A. "I would really, really, really like to do that because
14 I'm not..."

15 Q. And did you clarify with him whether or not he had a
16 problem?

17 A. I did. I asked him in fact do you feel you have a problem
18 that this would help?

19 And his answer was, "Probably, because this is --
20 this is very -- you know, this is very embarrassing for
21 one thing, and it doesn't add to the -- it doesn't make
22 things any better for me. I mean it's been very, very
23 crappy for me."

24 Q. Did you ask the defendant if he understood why Mariah was
25 concerned about what happened?

1 A. Yes, I did.

2 Q. What did the defendant say?

3 A. He said that he understood it.

4 Q. Did he understand -- did you ask the defendant if he
5 understood why his conduct with Mariah scared her?

6 A. Yes, I did.

7 Q. And what did he say when you asked the defendant, top of
8 page nine, if his conduct scared her?

9 A. He said, I do see. I do see your point of view, and I see
10 her point of view too."

11 Q. Did you ask the defendant if he had to do it over again
12 what would happen?

13 A. The question I asked him was along the lines of if you had
14 to do this over again, would you have had the same
15 physical contact with her.

16 Q. What did the defendant say?

17 A. No.

18 Q. Did the defendant try to explain his answer of why he
19 wouldn't have this same physical contact with Mariah if he
20 had to do it over again?

21 A. I'm going to have to refer to this. If you can point me
22 in the right direction. I know there was a response, but
23 I don't recall it.

24 Q. Toward the middle of page nine again, did he -- he looks
25 like he gives an answer where he indicates something about

1 trying to avoid contact, but --

2 A. Yes. Right.

3 Q. Could you please indicate to the jury what the defendant
4 said.

5 A. Upon my asking him that, he said, "Like I stated for
6 years, after, you know, I tried to avoid any physical
7 contact with Melissa's kids because I know they're -- you
8 know, how things have been in the past and I really showed
9 them no affection whatsoever. You know, I love them as in
10 for what they are, they're my nieces and nephews, but
11 that's to say -- is just to be a family love."

12 Q. So he's asked -- answering your question like he's tried
13 to avoid contact. Is that what he said to you?

14 A. That's how I took it, yes.

15 Q. On page ten you start asking him questions about whether
16 or not the defendant kissed Mariah on the outside of her
17 clothing in her vaginal area, correct?

18 A. Yes.

19 Q. And your second question on page ten, you ask him -- don't
20 you ask him is it possible that he could have kissed her,
21 correct?

22 A. Correct.

23 Q. What was his answer to is it possible that he had kissed
24 her on the outside of her clothing in the vaginal area?

25 A. "We were sweating like crazy, and then..."

1 Q. And did he indicate to you -- strike that. Did you ask
2 him whether or not he was under the influence of anything
3 that day?

4 A. I did.

5 Q. What did he say?

6 MR. MEYER: Your Honor, I'll object to this
7 as to relevance.

8 THE COURT: Overruled.

9 BY MS. PETERS:

10 Q. You can answer.

11 A. Mr. Rivera told me that that day he had been under the
12 influence of methamphetamines and marijuana.

13 Q. Did you ask him whether or not that drug use was clouding
14 his judgment?

15 A. I asked him if that could have impaired his judgment, and
16 he said yes.

17 Q. Did you ask the defendant -- actually, I'm going to direct
18 you to your first question on page eleven, and it looks
19 like in that question there -- and I'd like you to explain
20 that to the jury -- that you're trying to really clarify
21 your interview with the defendant; is that correct?

22 A. Correct.

23 Q. Could you please tell the jury what you asked him.

24 A. His response -- to correct his response to that last
25 question was, "I think so. I think so."

1 Q. And I'm sorry. Just so that we're clear, that is -- the
2 defendant said that to your asking if you using drugs --
3 using methamphetamine would tend to cloud his judgment.

4 A. That's correct.

5 Q. And the defendant said what?

6 A. "I think so. I think so."

7 Q. Okay. So after he says this, what do you say?

8 A. I asked him -- or stated, "Okay. That would be in the
9 potential case, okay? I'm not asking you if you think so.
10 I'm asking you for whatever reason, whatever reason, okay?
11 I'm not here to ask you why or under what, you know,
12 influence you may have had that day, whatever reason, is
13 that young little girl lying to me?"

14 Q. What did he say?

15 A. His response was, "In her version I don't think she's
16 necessarily lying. I don't think she's -- the way she
17 sees things, I think I -- things weren't well. Things
18 weren't..."

19 Q. And what did you say to that?

20 A. I asked him -- or said, "Things weren't well that day,
21 under the influence; is that right?"

22 Q. And what did the defendant say to that?

23 A. "Under the influence, but then again, I'm saying her point
24 of view, I see how she would -- she would think that
25 everything was just way out of hand and, you know, for

1 being -- not being as amorous with them as I'm usually
2 with the other kids and everything else."

3 Q. Did the defendant indicate to you -- strike that. One
4 moment. I'm sorry. Lost my place in this.

5 Okay. I think you go into another discussion
6 regarding the location of the incident. And then on page
7 13 you ask him -- your first question, again, you're try
8 -- looks like you're trying to clarify what the defendant
9 is telling you; is that correct?

10 A. Yes.

11 Q. And what was your question on the top of page 13?

12 A. "I see through that, Rafael, okay? You're telling me the
13 girl is telling the truth from her point of view."

14 Q. And what does the defendant say to that?

15 A. "I see her point of view. God, I do see her point of
16 view."

17 Q. Then what do you ask him?

18 A. "Okay. It wasn't anybody else, was it? We shouldn't be
19 out there arresting somebody else, should we?"

20 Q. Did he tell you that you should be out there arresting
21 somebody else?

22 A. He did not.

23 Q. What did he say?

24 A. He said, "No."

25 Q. Okay. Again, you confirmed with him that he needs to talk

1 to somebody about a problem, correct?

2 A. Yes.

3 Q. And did you clarify that it was a problem specifically
4 having to do with kids?

5 A. Yes.

6 Q. And what did he say specifically when you asked him about
7 a problem specifically having to do with kids?

8 MR. MEYER: I'd ask for a page number,
9 please.

10 BY MS. PETERS:

11 Q. Page 13, the middle of the page, the answer to the
12 question do you have a problem specifically having to do
13 with kids? What the defendant say?

14 A. He responded, "Maybe. I've been getting a little -- god,
15 you know, you're right. You're right. Because I don't
16 see this as being -- I'm not in any way malicious in any
17 way. I mean, I'm not being malicious in my mind. I'm not
18 being malicious, but maybe I do need to talk to someone
19 about that."

20 Q. Did you ask the defendant what he calls Mariah? What's
21 his name for Mariah? Does he have a nickname for her?

22 A. He does.

23 Q. What's his nickname for Mariah?

24 A. Hottie, hottie Mariah.

25 Q. Did you ask the defendant if he had to say anything to

1 you.

2 THE COURT: Thank you, Ms. Peters.

3 Mr. Meyer, do you have questions for Detective
4 Knight?

5 MR. MEYER: I do, your Honor.

6
7 C R O S S - E X A M I N A T I O N

8
9 BY MR. MEYER:

10 Q. Good afternoon, Detective Knight.

11 A. Good afternoon.

12 Q. How much time did you spend with Mr. Rivera?

13 A. I don't know exactly. I'd say within an hour roughly.

14 Q. And did any time during that hour did he affirmatively
15 tell you, yes, I touched Ms. Maninger at any particular
16 point?

17 A. Yes, he did.

18 Q. And did he ever specifically say I touched her in the
19 vagina intentionally?

20 A. No.

21 Q. Okay. And did he ever admit to having his face in her
22 crotch area?

23 A. No.

24 Q. Did he ever tell you he had his face in the crotch area?

25 A. No.

ORIGINAL
Attachment
3

Court of Appeals
Decision # 34827-6-II

2007



Washington State Court of Appeals
Division Two

A-1

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

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July 3, 2007

James C. Powers
Thurston County Prosecuting Attorney Ofc
2000 Lakeridge Dr SW
Olympia, WA, 98502-6001

Thomas Edward Doyle
Attorney at Law
PO Box 510
Hansville, WA, 98340-0510

CASE #: 34827-6-II

State of Washington, Respondent v Rafael Rivera, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:llp

Enclosure

cc: Judge Richard D. Hicks
Indeterminate Sentence Review Board
Defendant

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL RIVERA,

Appellant.

No. 34827-6-II

UNPUBLISHED OPINION

PENOYAR, J. — Rafael Rivera appeals his convictions on five counts of first degree child molestation,¹ challenging the trial court's decision not to sever the counts and hold separate trials. Because the trial court properly exercised its discretion in denying the motion, we affirm.

FACTS

In the morning on August 4, 2005, Michael Maninger left his daughter, MM, age nine at the time, and his son, Victor, age ten at the time, at his former-spouse's home for the day. He picked them up later that day after work. Later that evening, MM told Maninger that she did not want to go to her mother's house the next day. Maninger told her that he had no choice but to send her there because he could not afford to hire a babysitter. When MM offered to sell her dirt

¹ Violations of RCW 9A.44.083.

bike to raise the money, Maninger became concerned and took MM indoors to talk, where she disclosed that Rivera had touched her inappropriately.² RP 63.

Maninger called the Thurston County Sheriff, who turned the matter over to the Lacey Police Department, which interviewed MM a few days later. MM explained that she was at her mother's home that day with her brother, Victor, her half-brother, River, and her half-sister, Ruby. When Rivera arrived, her mother left the children with him. That day Ruby went to the library, the three children went swimming at the neighbors, and Rivera left on an errand. MM came home before her brothers and was lying on the living room couch when Rivera returned. Rivera sat down next to her, began kissing her between her legs over her skirt, and tried to put his hand up her skirt. MM kept pushing her skirt down to keep Rivera's hands out. MM also disclosed that after Rivera sat down, he picked up her legs and placed her feet over his lap, touching his groin area.

Lacey Police Detective Jeremy Knight interviewed Rivera on August 8, 2005. When Detective Knight disclosed MM's allegation about Rivera kissing the outside of her skirt and trying to get his hands inside, Rivera responded: "Okay. Well, I didn't -- I didn't think that was no. I don't think so. As to say maybe." 2 Report of Proceedings (Apr. 4, 2006) (RP) at 129. When Detective Knight asked Rivera if he felt he needed professional help, Rivera responded: "Probably, because this is -- this is very -- you know, this is very embarrassing for one thing, and

² Rivera had previously been married to Maninger's ex-wife's sister, Angela Rivera. Maninger knew Rivera but was not a friend of his and did not know that Rivera would be babysitting for Maninger's ex-wife that day.

it doesn't add to the -- it doesn't make things any better for me. I mean it's been very, very crappy for me." 2 RP (Apr. 4, 2006) at 131. Detective Knight asked Rivera if he could explain why these events frightened MM and Rivera responded: "I do see. I do see your point of view, and I see her point of view too." 2 RP (Apr. 4, 2006) at 132. Rivera also admitted that he was under the influence of methamphetamine and marijuana that day and that this could have impaired his judgment. When Detective Knight asked Rivera whether MM was lying, he responded: "I see her point of view. God, I do see her point of view." 2 RP (Apr. 4, 2006) at 136. Rivera told Detective Knight that he was not being malicious but that maybe he did need to talk to someone about his behavior. Finally, he said that he wished he could apologize to MM and her family.

When Angela Rivera learned about MM's allegations, she spoke with Norma Shelman, Rivera's ex-girlfriend and the mother of his five-year old son. Shelman had two other daughters, TAT and TMT, ten and eleven years old respectively. Angela Rivera knew that Rivera frequently watched Shelman's children so she told Shelman to talk to her daughters to see if anything inappropriate had happened between them and Rivera. Shelman's daughters did disclose sexual abuse and Shelman reported it to the Olympia Police Department. Both girls disclosed that Rivera had touched their vagina on top of and under their clothes. Both girls also disclosed that Rivera touched them when he was alone with them and no other adults were around.

Based on these events, the State charged Rivera with five counts of first degree child molestation: two counts for his conduct with MM, two counts for his conduct with TAT, and one count for his conduct with TMT. Rivera moved to sever the counts, asking for a separate

trial on the counts involving MM. The court denied the motion, ruling that Rivera failed to meet his burden of proving that severance was necessary. The court found that the jury could compartmentalize the evidence, that the evidence was cross-admissible to show a common scheme or plan, and that it would be unnecessarily expensive to hold separate trials. The court applied the considerations set out in *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990), which we discuss below. The court also held that in admitting the evidence of a common scheme or plan, this evidence's probative value outweighed any undue prejudice.

After the State rested, Rivera renewed his motion to sever, and again the trial court denied the motion. Rivera then testified on his own behalf. He acknowledged being alone with MM for a brief time in the afternoon and that they were seated on the couch eating chips. He denied touching or kissing MM and denied that he placed her feet on his groin. As to TAT and TMT, he acknowledged having babysat them but denied that he ever touched either girl over or under her underwear or pants. After the State questioned him extensively about his statements to Detective Knight, Rivera indicated that the statement also showed that he consistently denied having intentionally or maliciously touched M.M and denied having sexual intentions.

The jury found him guilty on all five counts. At a subsequent sentencing hearing, the trial court imposed concurrent 198 months-to-life sentences under RCW 9.94A.712. Rivera appeals.

ANALYSIS

I. SEVERANCE

Rivera raises a single issue on appeal, claiming that the trial court abused its discretion in denying his motions to sever the offenses. He argues that the jury could not easily have

compartmentalized the charges, the State's proof was limited to "he said she said" evidence and thus was not strong, and while his defenses were clear denials and the court instructed the jury to consider each charge separately, there was a strong possibility that the jury cumulated the evidence. He argues that the evidence of his statements to Detective Knight as to counts I and II strengthened the evidence against him as to counts III-V, for which he did not make a statement to the police.

He also argues undue prejudice, considering the nature of the charges and the hostility engendered by charging three victims rather than just one. *See State v. Hernandez*, 58 Wn. App. 793, 801, 794 P.2d 1237 (1990) ("It is apparent . . . that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.").

CrR 4.4(b) governs severance of offenses. It provides:

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

A defendant seeking severance bears the burden of demonstrating that a trial on multiple counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, 114 Wn.2d at 718. The trial court's refusal to sever counts is reversible only upon a showing that the trial court's decision constituted a manifest abuse of discretion. *Bythrow*, 114 Wn.2d at 717.

A trial court's refusal to sever counts may prejudice a defendant because:

(1) he may become . . . confounded in presenting separate defenses; (2) the jury may use the evidence of . . . one crime[] charged to infer . . . guilt [on another] crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Bythrow, 114 Wn.2d at 718. Factors that tend to mitigate prejudice that may arise from a refusal to sever offenses at trial include: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Applying these factors, we do not find an abuse of discretion.

First, the State's evidence was equally strong in both the situation where Rivera gave a statement (MM) and the situation in which he did not (TAT and TMT). All three victims gave testimony consistent with their original statements. All three victims disclosed the sexual abuse when alone with a parent. While a jury could infer some guilty knowledge from his statements, defense counsel aptly showed that throughout his dialogue with Detective Knight, Rivera never admitted molesting MM and insisted that if he touched her it was not malicious or with sexual intent. In both instances, the relative strength of the evidence was not "sufficiently dissimilar to merit severance." *Russell*, 125 Wn.2d at 64.

Second, in both situations, Rivera's defense was a straight denial. Rivera appears to concede that the clarity of his defense was not an issue. "The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on

each charge.” *Russell*, 125 Wn.2d at 64-65. Because Rivera’s general denial was the same for all counts, the likelihood of jury confusion was slight.

Third, the trial court properly instructed the jury to decide each count separately.³ Because we presume that a jury will follow the trial court’s instructions, this instruction to decide each count separately mitigated any prejudice. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

As to cross-admissibility, the trial court ruled that similarities in the evidence on the separate counts were sufficient to establish that Rivera acted with a common scheme. All five molestations took place in the privacy of the children’s or their relatives’ homes. In all five situations, Rivera was alone with his victims and in a position of authority. In all five situations, he had a familial relationship with his victim. In all five situations, he committed similar acts of molestation by either touching the girls over or under their underpants. The trial court found these facts sufficient to show a common scheme or plan. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (common scheme or plan requires only showing substantial similarities not unique or atypical similarities). This cross-admissibility reduced any potential for prejudice from the denial of the motion to sever. *State v. Price*, 127 Wn. App. 193, 204-05, 110 P.3d 1171 (2005), *affirmed on other grounds*, 158 Wn.2d 630 (2006).

Finally, we agree with the trial court that concerns for judicial economy outweigh any prejudice Rivera may have experienced. *Bythrow*, 114 Wn.2d at 723. The trial court did not abuse its discretion in denying Rivera’s motion to sever the charges.

II. STATEMENT OF ADDITIONAL GROUNDS

1. Effective Assistance of Counsel

In his pro se Statement of Additional Grounds (SAG), Rivera claims that he was denied his right to effective assistance of counsel because (1) counsel would not share discovery with him; (2) counsel failed to ask for a CrR 3.6 hearing; (3) counsel did not allow him to be present during the omnibus hearing; (4) he wanted to fire counsel because of an irreconcilable conflict; and (5) counsel failed to call witnesses that could have impeached his accuser.

The record before this court does not support any of these allegations. If a defendant wishes to bring a claim of ineffective assistance based on matters that are outside the appellate record, he must do so by means of a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) (“[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record.”); RAP 16.3 et seq.

2. Right to Discovery

Rivera also claims that he was denied his right to discovery and to be informed of all the information against him. He claims that the court, the prosecution, and defense counsel failed to provide him with all discovery, witnesses, and police reports before trial began.

Again, Rivera presents no evidence or citations to the record to support this claim and as such we cannot address it.

³ The court instructed the jury: “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” Clerk’s Papers (CP) at 99; Instr. 4.

3. Right to Unanimous Jury Verdicts

Rivera claims that he was denied his right to unanimous jury verdicts. This is so, he argues, because “each was Charged for a Different Day, Different Times, and involved different questions of validity.” SAG at 2

The record does not support this claim. First, the trial court instructed the jury: “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” Clerk’s Papers (CP) at 99; Instr. 4. Second, the court gave separate to-convict instructions on each count in which it distinguished that count from the others.⁴ Finally, each verdict form referred to a different count.

The trial court’s instructions protected Rivera’s right to a unanimous jury.

4. Adequacy of Information

He claims that the information charging him with these offenses was deficient because “it Charged him with Different Crimes, and Alternative Crimes that allegedly happened on Different Days, Times, and Validity of the Charged Crimes.” SAG at 2.

⁴ As to Count I, in part, it required the jury to find that “on or about August 4, 2005, the defendant had sexual contact with [MM].” CP at 105; Instr. 10. As to Count II, in part, it required the jury to find that “on or about August 4, 2005, the defendant had sexual contact with M.F.M. *at a time other than alleged in count I.*” CP at 106; Instr. 11 (emphasis added). As to Count III, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TAT.” CP at 107; Instr. 12. As to Count IV, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TAT *at a time other than alleged in count III.*” CP at 108; Instr. 13 (emphasis added). Finally, as to Count V, in part, it required the jury to find that “on or about between January 1, 2004 and August 1, 2005, the defendant had sexual contact with TMT.” CP at 109; Instr. 14.

This argument is meritless. The second amended information alleged five separate counts, distinguished the behavior constituting each count, named each victim, and specified the offense date. The State gave Rivera adequate notice of the charges against him so that he could present a defense against them. *See State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (citing 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 446 (1984); 1 C. Wright, *Federal Practice* § 125, at 365 (2d ed. 1982)) (articulating “essential elements” rule).

5. Right to Present Impeachment Evidence

He claims that he was denied a fair trial because he was not allowed to show that MM had accused two other people of the same crime. He also claims that he would have called MM’s mother to the stand to show that she had a pattern of calling the police on these same charges.

Again, Rivera presents no evidence or citations to the record to support this claim and as such we cannot address it.

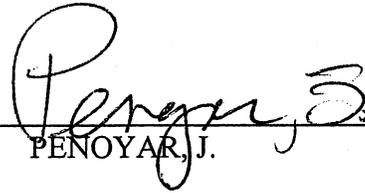
6. Right to Meaningful Appeal

Finally, he claims that he is being denied his right to an adequate appeal because he was not provided a copy of the trial transcripts as RAP 9.2 requires. The record shows that we mailed him ten volumes of the record on November 22, 2006, making his SAG due 30 days later. RAP 10.10(e). We received Rivera’s SAG on November 27, 2006. Yet it was not until January 24, 2007, that we received Rivera’s motion for an extension of time to file a supplement to his SAG. A commissioner of this court denied the motion as untimely. Rivera did not seek to modify that decision. In this procedural posture, Rivera cannot claim that he was denied his opportunity to mount a meaningful appeal.

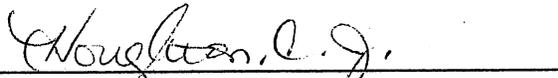
34827-6-II

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


PENOYAR, J.

We concur:


HOUGHTON, C.J.


QUINN-BRINTNALL, J.

Attachment
4

Decision on 7.8
2008

**Superior Court of the State of Washington
For Thurston County**



Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Richard D. Hicks, Judge
Department No. 3
Christine A. Pomeroy, Judge
Department No. 4

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

Gary R. Tabor, Judge
Department No. 5
Chris Wickham, Judge
Department No. 6
Anne Hirsch, Judge
Department No. 7
Carol Murphy, Judge
Department No. 8

June 15, 2009

Mr. Rafael Rivera, No.89330
Washington Correction Center
P.O. Box 900
Shelton, WA 98584

Clerk's Office
Washington Supreme Court
415 – 12th Avenue SW
P.O. Box 40929
Olympia, WA 98504-0929

Clerk's Office
Court of Appeals, Division II
950 Broadway, Suite 300 MS TB 06
Tacoma, WA 98402-4454

Mr. Andrew Toynbee
Deputy Prosecuting Attorney
2000 Lakeridge Drive SW
Olympia, WA 98502

RE: *STATE vs. Rafael Rivera*
Supreme Court, No. 83079-7
Court of Appeals, No. 38271-7
Superior Court No. 05-1-01484-2

Dear Mr. Rivera:

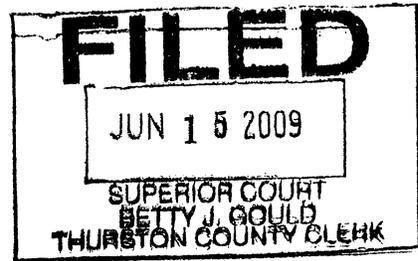
Enclosed is an Order Denying Vacation of Judgment and Sentence, Venue Change, and Disqualification of Judge, filed with the Thurston County Clerk on Monday, June 15, 2009. The Order incorporates attached Findings of Fact and Conclusions of Law.

Sincerely,

A handwritten signature in black ink that reads "Marti Maxwell".

Marti Maxwell, Administrator

Enclosures



SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
RAFAEL RIVERA,
Defendant.

No. 05-1-01484-2

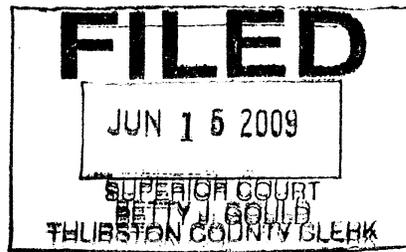
ORDERS DENYING
VACATION OF JUDGMENT
AND SENTENCE,
VENUE CHANGE AND
DISQUALIFICATION OF
JUDGE

IT IS HEREBY ORDERED that RAFAEL RIVERA's motions to vacate his judgment and sentence pursuant to CrR 7.8, to change venue, and motion to disqualify J. Hicks are DENIED. The basis and grounds for this ORDER is found in the subjoined, and now hereby incorporated, FINDINGS OF FACT and CONCLUSIONS OF LAW that are attached to this ORDER.

SIGNED this 15th day of June, 2009.

Handwritten signature of R. D. Hicks

Judge Richard D. Hicks
Thurston County Superior Court



**SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY**

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 05-1-01484-2
)	
vs.)	FINDINGS OF FACT
)	AND
RAFAEL RIVERA,)	CONCLUSIONS OF LAW
)	
Defendant.)	
_____)	

PROCEDURAL CHRONOLOGY¹

1. Jury trial in this matter occurred April 3, through April 5, 2006, with the state represented by Christy Peters and the defendant by Sam Meyer. The jury returned several verdicts of Guilty on April 6, 2006.

¹ This chronology is for the most part set out in this court's letter to the parties, Court of Appeals, and Supreme Court dated May 14, 2009.

2. On May 16, 2006, the court sentenced the defendant to a standard range sentence of 198 months. On that same day the defendant filed a Notice of Appeal.

3, On July 3, 2007, the Court of Appeals, Division II, filed a written, but unpublished, decision affirming the Judgment, including ruling on claims of ineffective assistance of counsel, alleged discovery violations and violation of the right to present impeachment evidence. There were further holdings but these are highlighted in light of what follows. They also note that certain claims, based on matters outside the record, should be advanced by a Personal Restraint Petition (p.8).

4. On December 17, 2007, the Superior Court received the Court of Appeals' Mandate terminating review and awarding certain costs and fees.

5. On June 2, 2008, a letter and request was filed from the defendant, addressed to Betty Gould, Thurston County Clerk, requesting a change of venue, and that J. Hicks be removed from his case. It also requested that the following people, alleged not to be involved in the accompanying motion(s), J. Hicks (again), Ms. Peters and Mr. Meyer, not be allowed to participate because there are complaints pending against each of them. For what it is worth, this is the first I have learned of any 'complaints.'

Although each motion is not separately stamped in by the Clerk's Office, it appears that there was a 'packet' of motions filed, including: (1) 'Correct' Judgment and Sentence, (2) motion for indigency, (3) motion to remove certain participants, (4) motion to change venue, and (5) motion to

FINDINGS OF FACT AND CONCLUSIONS OF LAW

transport. All were apparently filed in one batch on June 2, 2008, together with many pages of material said to support these requests for action, including bar complaints, public record requests, and so on. Two of these motions, (1) to correct judgment and (2) to transport the defendant, were noted for June 20, 2008.

5. On July 22, 2008, the defendant filed a re-note of these motions for August 8, 2008. Apparently, according to a note attached to DOC postage transfer, the original documents had been returned to the defendant by the Clerk. The file is difficult to follow because it appears all the original documents were again filed as duplicates.

6. Whether dated in June or July the Motion to Vacate Judgment and Sentence, is, of course, more than one year after the judgment was entered but within one year of the Mandate being filed which terminated appellate review.

7. On August 15, 2008, Carol LaVerne, DPA, noted a motion to amend the Judgment and Sentence and set the hearing date for October 2, 2008.

8. On August, 22, 2008, Andrew Toynee, DPA, appeared in front of J. McPhee who was sitting as a Criminal Presiding judge in our venue and J. McPhee signed an Order transferring defendant's motion to vacate judgment to the Court of Appeals.

9. On September 24, 2008, a letter was written to J. McPhee from the Court of Appeals, and filed with the Clerk, dated September 15, 2008, acknowledging receipt of the Order transferring the CrR 7.8 motion for

FINDINGS OF FACT AND CONCLUSIONS OF LAW

consideration as a PRP. However, in this letter the Commissioner of the Court of Appeals noted that CrR 7.8 had been amended on September 1, 2007, and requested that the court clarify whether the transport was appropriate under the new rule and *State v. Smith*, 144 Wn. App. 860, 184 P.3rd 666 (Div. II, 2008). The Commissioner advised that if a clarification was not received within 60 days that they will issue an order rejecting the transfer.

10. On October 2, 2008, a hearing on the motion to amend judgment and sentence came before J. Strophy, as Criminal Presiding and was continued until October 23, 2008.

11. On October 13, 2008, prosecutor LaVerne renoted the Motion to amend Judgment and Sentence to October 23, 2008.

12. On October 21, 2008, a "Letter To Court" was filed in the Clerk's file by the defendant regarding the costs asked for in the State's motion by prosecutor LaVerne to amend the Judgment and Sentence and noting that although this motion was making it to the docket that his prior motion to vacate had still not been heard.

13. On October 23, 2008, the defendant appeared telephonically before J. Hirsch, Criminal Presiding, where the minutes indicate the defendant had no objection to the prosecutor's motion to amend the Judgment and Sentence regarding costs. One might assume, but can't tell from the minutes, that defendant may have brought up to the prosecutor and J. Hirsch the court's failure to hear his pending motion to vacate while he was on the phone with the court. On this same date J. Hirsch signed an

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Amendment to Judgment and Sentence regarding the additional costs requested by the State.

14. On November 25, 2008, the Court of Appeals, entered a ruling rejecting the transfer of the case to the Court of Appeals.

15. On December 17, 2008, the defendant again noted his Motion to Vacate Judgment and Sentence for “Friday 16, 2009” (sic.). There is also in the file a copy of a note for January 16, 2009. On that same December date there is a letter filed, that is addressed to the Court of Appeals, regarding his pending CrR 7.8 motion, which had not been heard by either court.

16. On December 29, 2008, a letter dated December 19, 2008, and addressed to “Mr. Rivera/Counsel” regarding defendant’s inquiry regarding his motion was filed. This advised that no action would be taken until a certificate of finality, scheduled for December 26, 2008, had been filed that apparently dealt with a Remand to the Superior Court.

17. On January 5, 2009, a Certificate of Finality, was filed, noting that a decision filed on November 25, 2008, had become final on December 26, 2008, and that either the sentencing court or Criminal Presiding to place the matter on the next available motion docket. This certificate was sent to J. McPhee, Ed Holm, Rafael Rivera, and WSP.

18. On April 21, 2009, a Declaration of Service by Mail and Motion for Sanctions under RAP 18.9 was filed with the Declaration using the Superior Court Cause Number and the Motion using the Court of

Appeals Cause Number. Sanctions were requested against the Superior Court for failure to hold a hearing as Ordered by the Court of Appeals.

19. On May 12, 2009, a letter dated May 11, 2009, was received by J. McPhee from the Supreme Court, noted the defendant had filed a Petition for Writ of Mandate with the Supreme Court, with a request to waive filing fees, and noting an Answer could be filed by June 7, 2009, and that hearing without oral argument would be on July 7, 2009.

20. On May 14, 2009, this court wrote a letter to the parties and the higher courts detailing the above and requested that the prosecutor take immediate action to respond to defendant's motion and in any case respond within ten (10) business days. The prosecutor did not respond.

21. Receiving no action from the prosecutor, this court *sua sponte* sent a Notice of Hearing, pursuant to CrR 7.8(c)(3) on June 2, 2009, setting a telephonic hearing on defendant's motions for Friday, June 12, 2009.

22. On June 10, 2009, the prosecutor filed a Response to Rivera's motion.

THE HEARING

A telephonic hearing was held on Friday, June 12, 2009, and the court listened to argument by both Rivera and Deputy Prosecutor Toynbee. At the close of the hearing the court took the matter under advisement and asked both parties if they would waive notice of presentation and, if so, the court would file a written order with findings and conclusions. Both parties waived.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MOTIONS ARGUED²

1. Motion to Vacate Judgment. This motion is argued to be grounded in CrR 7.8(b)(2)(3)(4) and (5).
2. Motion to disqualify Judge Hicks (and others).³
3. Motion to change venue.⁴

EVIDENCE CONSIDERED

1. The Court of Appeals decision in this case under CA No. 34827-6-II, written by J. Penoyar and filed on July 3, 2007 with that court and filed December 17, 2007, with a Mandate with the Thurston County Clerk.⁵ That decision ruled on the following arguments of Rivera:⁶
 - 1.1 Severance of charges.
 - 1.2 Effective Assistance of Counsel.
 - 1.3 Right To Discovery.
 - 1.4 Right to Unanimous Jury Verdicts.
 - 1.5 Adequacy of Information.
 - 1.6 Right To Impeachment Evidence

² The court also found in the file a motion to transport which was not ruled upon by criminal presiding but appeared to be either denied or waived based on the prior telephonic hearing regarding amending the judgment and sentence insofar as costs are concerned.

³ This motion was not orally argued but the court is ruling on it based on the written material.

⁴ This motion was not orally argued but the court is ruling on it based on the written material.

⁵ This unpublished opinion is also found at *State v. Rivera*, 139 Wn. App. 1041 (Div. II, 2007), 2007 WL 1893678 (Wash. App. Div. 2).

⁶ Some of the arguments were noted but unruled upon because they contained matters outside the record.

1.7 Right to Meaningful Appeal.

These rulings by the higher court control this lower court's review of the identical matters.

2. A transcript of part of the state's motions *in limine* at trial, page 53, regarding the relevancy of other 'touching of Mariah Maniger' in dissimilar situations (a classmate at school and a developmentally delayed neighbor). Defense counsel did not object to the motion to exclude such evidence.

There being no objection the court granted the motion. Second, during the same hearing, at pages 54-55, the state's motion regarding excluding an arrest of Melissa Marney, the child's mother, who was not scheduled to testify in the trial. This too was not objected to by defense and therefore granted by the court.

3. Remarks made by Rivera prior to trial showing dissatisfaction with Mr. Meyer, especially in agreeing to a continuance that Rivera himself signed off on, which Mr. Meyer responded to at pages 15-17.

4. A colloquy with the court at page 7, asking if the defense was intended to call additional witnesses and defense counsel's statement that perhaps Rivera would be called but not others.

5. A letter dated September 27, 2007, to Rivera from Emily Logsdon of the Lacey Police Department, responding to a public records request apparently directed at records of Mariah Meninger.

6. A Lacey Police Department Report in Case No. 05-4033 for 7/15/05 by officer Aalbers, including a second page of narrative with certain names redacted.

7. A transcript/log of Lacey police dispatch on 7/14/05 into 7/15/05.
8. A public disclosure request dated 9/11/07 submitted by Rivera to Lacey police which received it on 9/27/07.
9. A public disclosure request dated 9/25/07 to Lacey police department referring to case no. 05-4033.
10. A public disclosure request dated 8/7/07 to Lacey police department requesting arrest records of Melisa Marney on August 5, 2005.
11. An envelope addressed to Rivera postmarked 8/23/07.
12. A letter dated August 22, 2007 to Rivera from Logsdon of Lacey police enclosing copies of records requested with certain redactions.
13. A copy of a police report of 2005-4458 on 8/5/05 regarding an altercation where the subject was Millissa Marney and the "victim*" was Rivera, made by officer Landwehrie.
14. Page two of the above report referring making a false statement to an officer.
15. A narrative police report in Case No. 2005-4458 (3 pages), August 5, 2005, by officer Landwehrle recounting statements that Millisa admitted lying about certain matters but that also Rivera had raped her on several occasions.
16. A narrative police report in Case No. 05-4458 (2 pages) by Lt. Matt Koehler regarding Millisa making a report on Rivera (also discussed above).
17. A 12/18/09 public disclosure request from Rivera to Paula Howell requesting her notes of his interview in January 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

18. Five pages of handwritten notes dated "1/13" detailing an interview with Rivera – apparently in response to the request above. These notes are annotated in another handwriting apparently Rivera's.
19. Prosecutor's statement of probable cause filed 8/9/05.
20. Letter, 4/30/08, from Congalton, WSBA disciplinary counsel, to Rivera enclosing Meyer's response to Rivera bar complaint.
21. Letter to Congalton from Meyer dated 4/25/08 in response to Rivera's grievance against Meyer.
22. Letter 5/5/08 to Rivera from Smith at the Thurston County Prosecutor's office regarding a request for certain police reports.
23. Mandate from Court of Appeals in No. 34827-6-II terminating review by the decision filed on July 3, 2007 which became final on December 4, 2007, and filed in Thurston County on December 17, 2007.
24. Contents of Thurston County Court file No. 05-1-01484-2.
25. Argument of Rivera, at time of this hearing, on this motion regarding how the above would change the trial outcome.

FINDINGS OF FACT

1. On April 6, 2006, a jury returned five (5) verdicts of guilty of Child Molestation in The First Degree convicting Rivera.
2. On May 16, 2006, the court, Judge Hicks, sentenced Rivera to a standard range sentence of 198 months.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

3. On May 16, 2006, Rivera filed a Notice of Appeal. Judge Hicks found him indigent, entitled to counsel at public expense and requested the appellate court to appoint counsel pursuant to RAP 15.2.
4. The Court of Appeals filed their decision on Rivera's appeal on July 3, 2007, written by the Honorable Penoyar, Judge, and signed by two other Court of Appeal judges.
5. A mandate terminating review was filed in Thurston County on December 17, 2008.
6. On June 2, 2008, Rivera filed an affidavit of prejudice against Judge Hicks, Christen Peters, and Sam Meyers.
7. On July 22, 2008, Rivera filed a note for several motions including to vacate his judgment and sentence pursuant to CrR 7.8.
8. On July 23, 2008, the motion to vacate judgment and sentence pursuant to CrR 7.8 was filed together with a legal memorandum.
9. On August 8, 2008, the motion came on for hearing before J. Hirsch, Criminal Presiding, and was continued until August 22, 2008.
10. On August 15, 2008, Deputy Prosecuting Attorney Carol LaVerne filed a notice to Amend the judgment and sentence to add the appellate costs to be heard on October 2, 2008.
11. On August 22, 2008, J. McPhee, sitting as Criminal Presiding, reviewed Rivera's motion to vacate pursuant to CrR 7.8, and signed an order presented by Deputy Prosecutor Andrew Toynebee, transferring the motion to the Court of Appeals for consideration as a Personal Restraint Petition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

12. On August 25, 2008, the Thurston County Clerk mailed the motion to the Court of Appeals.
13. By a letter signed September 15, 2008, and received in the Thurston County Clerk's office on September 24, 2008, the Court of Appeals wrote to J. McPhee through Clerk Ponzoha and advised him that the procedure under CrR 7.8 had changed in 2007 and that pursuant to *State v. Smith*, filed May 28, 2008, that J. McPhee needed to clarify and make the findings required under the rule. The Court of Appeals also mailed copies of this letter to the Thurston County Clerk, Rivera, and Ed Holm. The Court of Appeals advised if clarification was not made within 60 days that they would reject the transfer.
14. On October 2, 2008, the hearing noted to amend the judgment and sentence was continued by J. Strophy, Criminal Presiding, until October 23, 2008.
15. On October 13, 2008, Deputy Prosecutor Carol LaVerne re-noted her motion to amend judgment and sentence to October 23, 2008.
16. On October 21, 2008, Rivera filed a "Letter To The Court" complaining that his CrR 7.8 motion had been pending since May and yet the court was planning to hear the prosecutor's motion to amend the judgment in October.
17. On October 23, 2008, J. Hirsch heard Deputy Prosecutor LaVerne's motion to amend the judgment and sentence to include appellate costs and Rivera appeared telephonically for this hearing and made no objection to the

amendment.⁷ On this same date J. Hirsch signed an Order amending the Judgment and Sentence.

18. On December 17, 2008, Rivera wrote the Thurston County Clerk saying that they Court of Appeals had rejected the transfer of his CrR 7.8 motion and asking the Thurston County Clerk, “What happens next?”

19. Also on December 17, 2008, he renoted his motion to vacate pursuant to CrR 7.8 for “Friday 16, 2008” (sic.) and requested a telephonic hearing.

20. On December 19, 2008, Court of Appeals Clerk Ponzoha wrote Rivera with a copy to J. Hirsch saying the refusal to accept transfer was anticipated to be final on December 26, 2008.

21. On January 5, 2009, the Court of Appeals filed their Certificate of Finality with the Thurston County Clerk.

22. On April 21, 2009, Rivera filed a copy of his motion filed in the Court of Appeals requesting sanctions against the State and Thurston County for not following the Court of Appeals Mandate.

23. On May 11, 2009, the Supreme Court wrote J. McPhee, Ed Holm and Rivera regarding a Petition for Writ of Mandamus that Thurston County has failed to follow the Court of Appeals mandate. This letter was give to J. Hicks the late afternoon of May 13, 2008.

⁷ This is referred to *ante* wherein Rivera moved to be transported to Thurston County for all these motions. Obviously such a motion was denied but never addressed in a written order. Such motions are rarely granted because of security concerns

24. On May 14, 2008, J. Hicks reviewed the file and wrote the letter asking the Prosecutor to please address the Mandate and the pending motion of Rivera under CrR 7.8.

25. Since the Mandate terminating appellate review of Rivera's case was filed on December 17, 2007, and his Motion to Vacate his Judgment and Sentence pursuant to CrR 7.8 was filed on July 23, 2008, it was filed more than one year from entry of the Judgment and Sentence but within one year of the Mandate terminating appellate review.

26. RCW 10.73.090 sets a one year limit for a collateral attack on a Judgment and Sentence and RCW 10.73.090(3)(b) recognizes the appellate court's mandate as the triggering date for calculating the one year.

CONCLUSIONS OF LAW

1. Rivera's motion pursuant to CrR 7.8 is brought within the one year allowed pursuant to RCW 10.73.090(3)(b), and thus within a reasonable time as required in CrR 7.8(b).

2. RCW 10.73.100 allows collateral attack even beyond one year for (1) newly discovered evidence not early found with reasonable diligence by the defendant, (2) the statute supporting conviction was found unconstitutional, (3) the conviction was barred by double jeopardy, (4) the evidence at trial was insufficient to support a verdict of guilty, (5) the sentence imposed was in excess of the court's jurisdiction, and (6) there has been a significant change in the law which is material to the conviction. The

only section of this statute that could reasonably and sensibly apply to the argument made by Rivera is RCW 10.73.100(1), yet he is within one year of the mandate so it is not necessarily brought into play.

3. RCW 10.73.130 sets out that RCW 10.73.090 and RCW 10.73.100 apply only to petitions filed more than one year after July 23, 1989. This motion is filed more than one year after July 23, 1989.

4. RCW 10.73.140 sets out that if a person has previously filed a petition for personal restraint then subsequent petitions will be limited and additional showings need be made.

5. *State v. Smith*, 144 Wn. App. 860, 863-864, 184 P.3rd 666 (Div. II, 2008), points out that a CrR 7.8 motion does not operate to bar a later filed personal restraint petition and thus to transfer to the Court of Appeals without this notice, and an opportunity to object to the transfer, would be an error.

6. Rivera's several motions all fall within the RCW 10.73.090 one year limit allowing collateral attack via CrR 7.8. Therefore, Rivera's motions are not barred pursuant to RCW 10.73.090.

7. Rivera has not made a substantial showing that he is entitled to relief. Further pursuant to *State v. Forest*, 125 Wn. App. 702, 707-708, 105 P.3rd 1045 (Div. II, 2005), Rivera is not entitled to appointed counsel at this stage of a CrR 7.8 motion.

7.1 Rivera claims newly discovered evidence that would trigger CrR 7.8(b)(2). However his material demonstrates no new evidence that would not, or could not, have earlier been available – if admissible – prior to

trial. It is clear that Rivera shared his theory of the case with his counsel Sam Meyer regarding the victims making other allegations at other times and that Melisa Marney (mother of one of the victims) was ‘out to get him,’ and had a history of false reporting. Melisa Marney was never called as a witness by either side. The defense could have subpoenaed Ms. Marney if it was considered she had exculpatory evidence but tactically chose not to call her. The Court of Appeals has already noted Rivera’s claims of ineffective assistance of counsel. Rivera’s subsequent discovery, of what he knew to exist but did not have the documentation for, of police reports in Lacey cases No. 05-4033 and 05-4458, dealing not with this case but a case involving Melisa Marney, is the same material and not new. He claims it is “impeaching evidence” but this person was never called as a witness even though her identity and prior history was known. Since she was known prior to trial by both the prosecutor and the defense, and thus made the subject of an uncontested motion *in limine*, it is uncertain to what extent she might have been allowed to testify. However, even if this court assumes the entire contents of those reports were admissible, which clearly they are not (ER 401, ER 404), they would hardly attack the veracity of the three minors who testified and who were subject to cross examination regarding anyone’s undue influence.

7.2 Rivera claims fraud that would trigger CrR 7.8(b)(3). Rivera claims that fraud was perpetuated by Lacey Detective Jeremy Knight and the Thurston County Prosecutor’s office. The basis of this is that when making voluntary statements to detective Knight, those that Rivera considered were

exculpatory were ignored. Rivera stated that no one ever questioned him (he was represented by counsel by this time) about other potential “victims.” He claims detective Knight ‘suppressed’ exculpatory evidence but the facts show such is not the case. It was knowledge of the existence of Ms. Marney, and her alleged unwholesome character, that brought the Deputy Prosecutor, Ms. Peters, to make her motion *in limine* to exclude evidence of Ms. Marney’s prior bad acts. Clearly there was no hidden suppression in fact it was disclosed, made the subject of a motion *in limine*, it appears on the record, and defense counsel apparently agreed there was either no admissible evidence, or, what evidence might have been forthcoming was not helpful to Rivera. There was no fraud hiding exculpatory evidence, whether of Ms. Marney or Mr. Marney. Further, even if somehow, under some theory, Rivera could have placed Ms. Marney before the jury in the actual trial (she did not testify instead the jury heard testimony of the actual victims), MFM (minor victim), TAT (minor victim), and TMT (minor victim) to impeach her on a collateral matter, or, to accuse her of undue influence, there are insurmountable evidentiary issues, ranging from her own rights under the Fifth Amendment to the limitations of ER 404 but most important there is no link that she in any way could impeach the testimony of the three minors. Rivera’s argument that it is possible his attack on the character of Ms. Marney could impeach the live testimony of the three minor victims can not rise to more than a mere possibility – if that – of a different outcome. It is clear that the jury believed the children whose testimony they heard live.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

7.3 Rivera claims the judgment is void triggering CrR 7.8(b)(4). Rivera's memorandum presents a salad of constitutional principles more or less based on *Brady v. Maryland*, 373 U.S. 83 (1963) and his theory of the bad character of Ms. Marney (and her husband) being somehow exculpatory evidence that was not disclosed (which it was) or improperly excluded (which it was not – it was the subject of a motion *in limine* and agreed to). There was no violation of due process by fraud of law enforcement or the prosecutor's office. In *Brady* a co-defendant⁸ had made a statement wherein he admitted to the actual homicide and even though requested by Brady's counsel to provide all extrajudicial statements, and several were produced, the prosecutor withheld the statement of this admission. Brady only learned of this additional statement after being sentenced to death and the conviction affirmed. The trial court denied post-conviction relief but the Court of Appeals reversed and it came to the Supreme Court on certiorari. The Supreme Court agreed with the Court of Appeals that the suppression of the co-defendants confession was a violation of the Due Process clause of the Fourteenth Amendment. There is no deliberate deception in our case nor did the state allow false evidence to go uncorrected. Suppression by the prosecutor of evidence favorable to the accused upon request does violate due process where the evidence is material with or without bad faith, *Brady*, p. 87. There is nothing like that in this case. The evidence that might have come in through Ms. Marney (and it is highly doubtful there was any

⁸ The trials were separate but it was the same homicide at issue.

admissible material evidence that would have been allowed) was the subject of a motion *in limine* that was not opposed not the subject of any suppression by law enforcement or the prosecutor. The same can be said for the police report 05-4033 dealing with an unrelated matter but revealing the character of Ms. Marney and Mr. Marney. Rivera knew of all this (maybe not the report number) and even if he didn't make it clear to Mr. Meyer the extent of what he knew the fact remains that nobody called these people to testify even though their identity was well known – probably because there was no direct evidence that would impeach the three children who did testify.

7.4 Rivera claims 'other reasons justifying relief' which would trigger CrR 7.8(5). Here there is a request for the court to undertake to represent Rivera in his motion and 'see what it can find.' That is too much. If the court in reviewing this matter came upon something significant it would bring its attention to bear on correcting the error but in reviewing everything submitted by Rivera there is nothing that rises to a level where the jury's verdict should be set aside.

8. Resolution of this motion does not require further factual hearings. It is clear from Rivera's submissions what his theory is insofar as CrR 7.8 could be involved and nothing would be served by further testimonial hearings. For purposes of this motion this court takes *arguendo* the contents of those reports into consideration and they do not rise to evidence sufficient to vacate the jury's verdicts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

9. Rivera's CrR 7.8 motions are denied. There is not newly discovered evidence that would probably change the results of the trial and that was not discovered since the trial and could not have been discovered (in fact was for the most part known) before the trial, that is material, and not merely cumulative or impeaching.

10. Rivera's motion to change venue is denied. Unlike a personal restraint petition which may be heard by a higher court sitting someplace other than the venue of the trial, this is a case from this community. This was a Thurston County jury trial, heard by the citizens of this community and now their verdict is being attacked – post conviction. This is the proper venue for such a challenge absent some strong showing why not and such a showing has not been made.

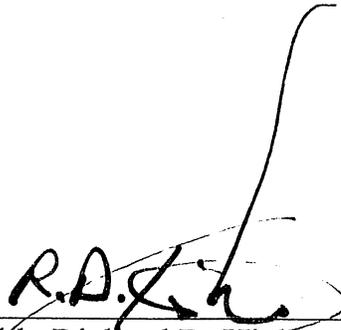
11. Rivera's motion to disqualify Judge Hicks is denied. Judge Hicks is the trial judge who heard the facts in the case and is in the best position to compare Rivera's new material in support of his motion to the facts developed in the case or, as Rivera claims, any facts not offered which might have been offered – if admissible. Judge Hicks has already made many discretionary rulings in this case and thus it is too late to file an effective affidavit of prejudice and if this is understood as a request to recuse such a request is denied on the basis of judicial efficiency and, in fact, J. Hicks has no demonstrable (or actual) bias toward Rivera or any particular interest in this case.

12. Almost all of what Rivera has now brought before the court was the subject of his appeal and ruled upon by the Court of Appeals though certain

FINDINGS OF FACT AND CONCLUSIONS OF LAW

portions were denied as being outside the record. At this point this court merely advises Rivera that any further challenges under a petition for personal restraint will subject him to the requirements and limitations of RCW 10.73.140.

SIGNED this 15th day of June, 2009.

A handwritten signature in black ink, appearing to read "R.D. Hicks", written over a horizontal line. The signature is stylized and includes a long, sweeping flourish that extends upwards and to the right.

The Honorable Richard D. Hicks
Thurston County Superior Court Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II

10 JAN 21 PM 2:17

STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE BY MAIL

This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following document(s):

PRO-SE SUPPLEMENTAL BRIEF #39595-9-II, EXHIBITS #1-NOTES OF PAULA HOWELL

STATEMENT OF SAM MEYER(defense), motion in limine, Lacey police reports

05-4458 and 05-4033, with attachments # 1 Certification of Probable cause

2 Direct examination of Det. Knight, Mariah Maninger, and Mike Maninger

Court of appeals decision #34827-6-II, Superior Court decision CrR 7.8

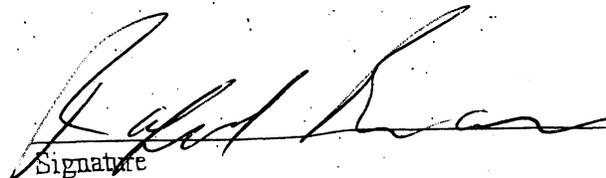
By depositing in the United States mail, marked *Legal Mail*, postage prepaid, on this 19
day of January, 2010 to the following: Court of Appeals Div.

II, 950 Broadway Ste. 300, Tacoma, Wa. 98402-3694

Thurston County Prosecutor 2000 Lakeridge Dr. S.W.- Olympia, Wa. 98502-

Defense Attorney Anne M. Crusier P.o.Box 1670, Kalama, Wa. 98625

Respectfully Submitted



Signature

RAFAEL RIVERA 893330 Ced.Hall G-11

Printed/Typed Name

W.C.C. P.O. Box 900

Address

Shelton, Wa. 98584

City

State

ZIP